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The Nature of Language Rights¹

Xabier Arzoz

Abstract

The discussion on language rights is affected by some confusion on the nature and status of rights. In this paper, a rigorous characterisation of language rights is proposed. It is argued that the general assimilation or equation between language rights and human rights is not only erroneous as far as it is inaccurate, but it leads to a distorted image of the relationship between law and politics. While human rights do limit (at least, ideally) state behaviour, language rights are, more often than not, an issue devolved to the political process. The point being made in this paper is that recognition of language rights (as such or as part of minority rights) is based primarily on contingent historical reasons. Some tentative explanations on the poor status or unequal recognition of language rights in international and domestic law will also be offered throughout the paper.

The literature on linguistic human rights is very hortatory and at times strident. It echoes to “shalls” and “shoulds” and “musts” (...).

Christina B. Paulston (IJSL 1997: 188)

1. Introduction

Human rights are an integral part of the legal revolution that has taken place in the world since 1945. They have also become a significant element of modern political culture. The discourse of rights has permeated the popular political culture and even many non-legal scientific disciplines.² When an individual or a group has a claim, it tends to be formulated in a rights discourse and, more often than not, in a human rights discourse. Certainly, the rights discourse has proven very useful for many groups in recent decades. For example, the legal situation of some groups such as lesbian, gay, bisexual, and transsexual individuals has improved enormously in a short period of time, in part as a result of appealing to the idea of human rights.³

However, the success of the rights revolution has also produced an inflation of rights claims. The range of interests subject to rights claims has grown considerably. It is true that the list of

¹ An earlier draft of this article was presented at the Tenth International Conference of the Academy of Language Law (Galway, Ireland) in 14-17 June 2006. I am indebted to Grégoire Webber for correcting the style and commenting on the content of this article.

² On the growth of rights discourse, see Martin Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Hart Publishing, Oxford, 2000), 197-214; Norberto Bobbio, *The Age of Rights* (Polity Press, Cambridge, 1996); Martti Koskenniemi, “The Effect of Rights on Political Culture”, in Philip Alston, Mara Bustelo and James Heenan, (eds.), *The EU and Human Rights* (Oxford University Press, Oxford, 1999), 99.

³ Robert Wintemute, “Sexual Orientation and Gender Identity”, in Colin Harvey (ed.), *Human Rights in the Community* (Hart Publishing, Oxford, 2005), 175.

human rights in international instruments is impressive and appears to be forever expanding.⁴ The notion of human rights has special appeal to many minority language activists, lawyers and scholars, which tend to address and invoke language rights as though they were obviously human rights or as though they existed prior to positive enactment. In particular, a number of specialists on minority language issues have been advocating a human rights approach to language rights.⁵ Indeed, they have popularized the concept of ‘linguistic human rights’. The claim to ‘linguistic human rights’ suggests a rather extended language rights scheme for the benefit of every habitant of the planet. The emphasis of the ‘linguistic human rights’ approach is placed on language rights *to education*. It is argued that only the rights to learn and to use one’s mother tongue and to learn at least one of the official languages in one’s country of residence can qualify as ‘inalienable, fundamental linguistic human rights’.⁶ By contrast, the notion of ‘linguistic human rights’ is less certain when taken outside the context of educational rights.

Sometimes, international organizations contribute to creating a false image of an extended level of protection of language rights. For instance, if one visits a United Nations Educational, Scientific and Cultural Organization (UNESCO) webpage and consults the international legal instruments dealing with linguistic rights listed there, one gets the impression that ‘linguistic human rights’ are a consolidated category with a sound basis in contemporary international law. Forty-four documents “relevant for linguistic rights” are gathered there, including UN and UNESCO Declarations and Conventions (17), UN and UNESCO Recommendations (7), European Declarations and Conventions (14), Inter-American Declarations and Conventions (4) and African Conventions (2).⁷ But a review of the content of these instruments reveals that the set of linguistic human rights is less abundant, and their scope of protection less extensive, than what appears at its surface.

In this paper, I will try to show that there are some problems with the human rights approach to language rights. This approach depends upon a number of assumptions about law and human rights, which the science of law—jurisprudence—might find, at best, questionable.⁸ First of all,

⁴ Philip Alston persuasively argued in 1984 the adoption of procedural safeguards to avoid an anarchic proliferation of new rights. See Philip Alston, “Conjuring up new human rights: A proposal for quality control, 78 *American Journal of International Law* (1984), 607-621.

⁵ Robert Phillipson, Mart Rannut, and Tove Skutnabb-Kangas, “Introduction”, and Tove Skutnabb-Kangas and Robert Phillipson, “Linguistic Human Rights, Past and Present”, both in Tove Skutnabb-Kangas and Robert Phillipson (eds.) *Linguistic Human Rights: Overcoming Linguistic Discrimination* (Mouton, The Hague, 1994), 1, 71; Tove Skutnabb-Kangas, “Language Policy and Linguistic Human Rights”, in Thomas Ricento (ed.), *An Introduction to Language Policy: Theory and Method* (Blackwell, Oxford, 2006), 273; Rainer Enrique Hamel, “Introduction: Linguistic Human Rights in a Sociolinguistic Perspective”, 127 *International Journal of the Sociology of Language* (1997), 1-24, at 1. See also Miklós Kontra, Robert Phillipson, Tove Skutnabb-Kangas et al. (eds.), *Language: A Right and a Resource. Approaching Linguistic Human Rights* (Central European University Press, Budapest, 1999).

But see Christina Bratt Paulston, “Epilogue: Some Concluding Thoughts on Linguistic Human Rights”, 127 *International Journal of the Sociology of Language* (1997), 187.

⁶ Skutnabb-Kangas and Phillipson, *Linguistic Human Rights*...102. For a specific discussion on the right to mother-tongue-medium education, see Tove Skutnabb-Kangas, “The Right to Mother Tongue Medium Education: The Hot Potato in Human Rights Instruments”, II *Mercator International Symposium: Europe 2004: A new framework for all languages?* (2005), at <http://www.ciemen.org/mercator/pdf/simp-skuttnab.pdf>.

⁷ <http://www.unesco.org/most/ln2int.htm>

⁸ For a critical discussion of the ‘linguistic human rights’ approach from a political theory perspective see Alan Patten and Will Kymlicka, “Introduction: Language Rights and Political Theory: Context, Issues, and Approaches”, in Will Kymlicka and Alan Patten (eds.), *Language Rights and Political Theory* (Oxford University Press, Oxford, 2003) 1-51, at 1, 33-37; See also, Leslie Green, “Are Language Rights Fundamental?”, 25 *Osgoode Hall Law Journal* (1987), 639-669, at 693; Denise G. Réaume, “Official-

it is striking that the notion of limits (practicability, critical mass, demographic concentration, availability of corpus and status resources, etc.) is scarcely mentioned in the 'linguistic human rights' approach. The notion of limits is even more cogent should linguistic human rights actually become human rights, because a notion of limits is inherent to the concept of rights: since they inevitably clash with each other and with other respectful values, most human rights are not absolute.⁹ This has been also stressed by distinguished scholars with a long-standing commitment to minority language maintenance and revitalization. For Joshua Fishman, a principle of ethnolinguistic democracy must incorporate some notion of limits.¹⁰ Similarly, Henri Giordan has stated that "un programme d'écologie linguistique doit opérer des choix culturels et politiques".¹¹

But the major problem lies with the danger of misrepresenting the actual status and significance of language rights in the context of human rights law, international law and constitutional law. This is an area where excessive expectations lead to disappointment. The claim to 'linguistic human rights' sharply contrasts with the demands of positive law, both international and domestic. The 'linguistic human rights' approach oscillates between, on the one hand, considering 'linguistic human rights' as international law norms and, on the other, considering them as abstract ideals or claims; between, the one hand, sweeping affirmations of massive violation and deprivation of linguistic human rights and even linguistic genocide and, the other, the quest for "what should be regarded as inalienable, fundamental linguistic human rights".¹² For sure, the approach is well-intentioned: it aims to secure intergenerational continuity of minority languages and to redress part of the existing inequalities. However, it should be clarified that 'linguistic human rights' must be interpreted along these lines as, above all, ideals and aspirations, and not as entitlements already recognized by international binding rules and whose effective implementation can be demanded of states.

In this paper, I propose to draw a more rigorous characterization of language rights. I shall argue that the general assimilation or equation between language rights and human rights is not only erroneous, but it leads to a distorted image of the relationship between law and politics. While human rights do limit (at least, ideally) state behaviour, language rights are, more often than not, an issue devolved to the political process. One should keep in mind the difference between those rights which are currently characterized as human or constitutional rights and the aspirations which one believes ought to be also characterized as such. Of course, many disagree with the current arrangements and advocate the development of international law with a view to recognize further language rights. That is fully legitimate, but I have chosen to focus on the status of language rights as they stand now. Some tentative explanations on the poor status or unequal recognition of language rights in international and domestic law will be offered throughout the paper.

Language Rights: Intrinsic Value and the Protection of Difference", in Will Kymlicka and Wayne Norman (eds.), *Citizenship in Diverse Societies* (Oxford University Press, Oxford, 2000), 245.

⁹ See, e.g., John Laws, *The Limitations of Human Rights*, Public Law (1998), 254.

¹⁰ Joshua A. Fishman, "On the Limits of Ethnolinguistic Democracy", in Tove Skutnabb-Kangas and Robert Phillipson (eds.), *Linguistic Human Rights: Overcoming Linguistic Discrimination* (1994), 49. As Fishman notes, "it is difficult for societies to maintain several languages simultaneously". In that work, he addresses the "dilemmas of the smallest mother tongues, namely those that are 'non-governmental' everywhere that they are spoken".

¹¹ Henri Giordan, "Droits des minorités, droits linguistiques, Droits de l'Homme [Minority Rights, Language Rights, Human Rights]", in Henri Giordan (ed.), *Les Minorités en Europe : Droits Linguistiques et Droits de l'Homme* (Éditions Kimé, Paris, 1992), 9, 28.

¹² The following statements have been taken from Phillipson, Rannut, and Skutnabb-Kangas, *Linguistic Human Rights...4*: "(...) it is common for people to be deprived of their linguistic human rights"; "Linguistic rights should be considered basic human rights"; "we affirm categorically that *all* individuals and groups should enjoy universal LHRs [linguistic human rights]" (emphasis in the original).

2. Defining Language Rights

Before going into the search of language rights in international and domestic law, it seems appropriate to briefly define the notion of language rights. For some, this seems to be an almost impossible enterprise. It has been claimed in this respect that the only valid generalization one can make about language legislation and linguistic rights is that “the practical meaning of language rights has not yet been established anywhere”.¹³ But it seems safe to say that the regulation of both human and state behaviour through law always includes, explicitly or implicitly, a linguistic aspect. Therefore, language rights are concerned with the rules that public institutions adopt with respect to language use in a variety of different domains.¹⁴ Constitutionally speaking, language rights refer to a *particular* language or small group of *languages*.

Still, it should not be ignored that the main preoccupation addressed by the notion of language rights is the legal situation of speakers of non-dominant languages or where there is no single dominant language. When two or more languages are officially recognized, despite the use in legal norms of generic phrasing guaranteeing *any person* the right to use *either* or *any* official language, the purpose of these rights is to enable speakers of the *minority* language to use their own language rather than the majority language.¹⁵

Obviously, speakers of dominant languages do also have language rights; but those rights are well guaranteed and enforced by social rules and practices, irrespectively of their rights being constitutionally or legally entrenched.¹⁶ With regard to speakers of dominant languages, there can be intra-lingual regulations governing the acceptable usage of a single language: the imposition of one dialect within a national school system inevitably favours one class or one region over another, and disadvantages native speakers of ‘non-standard’ or even stigmatized dialects as much as the imposition of a language disadvantages native speakers of non-official languages.¹⁷ However, scholarly writings and international documents often ignore or expressly exclude these inter-lingual conflicts. For instance, the European Charter for Regional or Minority Languages (ECRML), which is the most comprehensive international legal document in the field (see below), expressly excludes ‘dialects of the official language(s) of the State’ from its scope; moreover, it leaves wide discretion to contracting states to decide which forms of expression used in their territory are ‘regional or minority languages’ and which merely ‘dialects’.

¹³ Douglas A. Kibbee, “Presentation: Realism and Idealism in Language Conflicts and Their Resolution”, in Douglas A. Kibbee (ed.), *Language Legislation and Linguistic Rights: Selected Proceedings of the Language Legislation and Linguistic Rights Conference, the University of Illinois at Urbana-Champaign, March 1996* (J. Benjamin Publishers, Amsterdam, Philadelphia, 1998).

¹⁴ For a survey of ‘different domains in which language policy choices get made’ (internal usage; public services; courts and legislatures; education; private language usage; immigration, naturalization, and enlargement; and official declarations), see Patten and Kymlicka, *Language Rights ...*, 16-25.

¹⁵ Réaume, *Official-Language Rights ...*, 259. It can also happen that a language, which is dominant in the whole national territory, is in minority in a given region.

¹⁶ In many cases, the rights of economically and politically powerful linguistic minorities are also reasonably well respected.

¹⁷ Kibbee, “Presentation: Realism and Idealism...”, note 13, xii and Douglas A. Kibbee, “Legal and Linguistic Perspectives on Language Legislation”, in Douglas A. Kibbee (ed.), *Language Legislation and Linguistic Rights ...* (1998), 1, 2; Robert Dunbar, “Minority Language Rights in International Law”, 50 *International and Comparative Law Quarterly* (2001), 90, 96-98; Richard L. Creech, *Law and Language in the European Union: The Paradox of a Babel 'United in Diversity'*, Europa Law Publishing, Groningen, 2005), 136-137.

For our enquiry, it is useful to distinguish two broad categories of language rights, or two kinds or levels of protection that can be granted by law: on the one hand, the regime of linguistic tolerance, which includes rights that protect speakers of minority languages from discrimination and assimilation; on the other hand, the regime of linguistic promotion, which includes certain 'positive' rights to key public services, such as education, relationships with public power (government, courts, etc.) and public media, through the medium of minority languages.¹⁸

The distinction between negative and positive language rights has been recently criticized. On the one hand, the distinction would be too crude. It is argued in this respect that, for instance, the right of an accused person lacking proficiency in the usual language of the court to a court-appointed interpreter does not belong in either the category of tolerance-oriented rights or the category of promotion-oriented rights.¹⁹ This is true. But this is not a flaw of the distinction. The right to have free assistance of an interpreter if she cannot understand or speak the language used in court is a well-established human right which applies to anyone facing a criminal charge against her.²⁰ The right to an interpreter does not aim to afford tolerance, protection or promotion for any language or any linguistic identity. Its rationale lies somewhere else: in securing trial fairness.²¹ The sole objective of the right is effective communication; it does not independently value the language of the accused: if the accused can understand and be understood by using the court's language, even if it is not his mother tongue or preferred language of expression, the law will hold that effective communication is adequately served by using the court's language.²² The guarantee of a minority language differs from accommodation insofar as knowledge of the major language is not a bar to the provision of minority language services.

On the one side, the demarcation between language rights, and on the other side, the right to a fair trial, has been superbly established and applied by the Italian Constitutional Court²³ and by the Canadian Supreme Court. The latter stated in the *Beaulac* case:²⁴

The right to a fair trial is universal and cannot be greater for members of official language communities than for persons speaking other languages. Language rights have a totally distinct origin and role. They are meant to protect official language minorities in this country and to insure the equality of status of French and English.

On the other hand, it has been argued that the above mentioned distinction has some implications that are not necessarily true: for instance, that a tolerant regime is much more feasible an option than it really is; that whatever measure to accommodate a certain language aims at protecting the language and culture to which it belongs; and that protecting individual spaces of freedom and autonomy through non-interference rights, allowing for such spaces to be used as spaces of cultural and linguistic expression is simply an inevitable corollary, not something that the state actively pursues in order to protect or promote certain languages and

¹⁸ On this differentiation, see Dunbar, *Minority Language Rights* ..., 91-92.

¹⁹ Patten and Kymlicka, *Introduction: Language Rights* ..., 27-28. However, this objection does not prevent these authors from occasionally later using the distinction.

²⁰ Article 14(3) (f) CCPR.

²¹ Réaume, *Official-Language Rights* ..., 255-8.

²² *Ibid*, 256.

²³ See, e.g., Judgment 22/1996.

²⁴ *R. v. Beaulac*, 768 1 S.C.R. (1999).

cultures.²⁵ The main criticism seems to be that the state can not guarantee perfect linguistic neutrality as it can, in principle, guarantee religious neutrality: since the state must designate a certain language (or languages) for providing social services and for ruling its linguistic behaviour *vis-à-vis* citizens, it inevitably favours the community (or communities) whose language (or languages) it has assumed.

In my view, there are still good reasons to use the distinction between negative freedoms and positive rights for a law-based discussion of language rights. First, the above mentioned implications may be a product of contextual understandings, not something inherent to a distinction that appears to be rather technical in character. The distinction between tolerance- and promotion-oriented rights is fully silent on the concrete motivations that lead states to take measures in this field. Promotion-oriented rights can be accorded by reasons other than the wishes expressed by the adult members of the linguistic minority: for instance, a public interest that minority school-aged children in, at least the primary school, efficiently educated;²⁶ the goal of preserving the national cultural heritage, or the state's interest to make legislation and other public services accessible to all citizens.²⁷

Second, language rights function in some specific ways in relation to the status of the individual as well as to the exercise of state powers. The theory of fundamental rights distinguishes three basic functions (which correspond to three basic normative structures) in the relation between the individual and the state: *status negativus*, *status positivus* and *status activus*.²⁸ The *status negativus* concerns freedom from interference from the state. The *status positivus* refers to the circumstances in which the individual cannot enjoy freedom without the active intervention of the state: one of the most important rights belonging to the *status positivus* is judicial protection, but it also extends nowadays to many forms of social protection and social services (schooling, housing, health care and so on). The *status activus* refers to the exercise of the individual's freedom within and for the state. These concepts, which have been construed to structure the relation of the individual and the state, also provide a useful analytical tool to approach the special needs of protection of minorities' characteristics (*status positivus*) and of institutional representation and participation of minorities (*status activus*).²⁹ The underlying idea is that the general ban on discrimination and other classical individual rights are not sufficient for the protection of minorities, and that their unique position within society justifies providing them

²⁵ Ruth Rubio-Marín, "Language Rights: Exploring the Competing Rationales", in Will Kymlicka and Alan Patten (eds.), *Language Rights and Political Theory* (Oxford University Press, Oxford, 2003), 52, 55. This author proposes an alternative distinction between instrumental and non-instrumental language rights.

²⁶ Green argues that these accommodations are tolerance-based language rights, since, even if they are substantial and positive, merely ensure that language does not stand in the way of receiving an effective education and that membership in a linguistic community is no obstacle to integration into the mainstream state life. It must be noted that these integrationist accommodations are temporary. See Green, *Are Language Rights Fundamental?* ..., 662.

²⁷ On promotion-oriented rights being recognized without or against the will of the protected group, see Heinz Kloss, *Grundfragen der Ethnopolitik in 20. Jahrhundert [Fundamental questions of ethnopolitics in the 20th century]*, (Braumüller, 1969), 269-304.

²⁸ This distinction goes back to Georg Jellinek. See Bodo Pieroth & Bernhard Schlink, *Grundrechte: Staatsrecht II [Fundamental Rights: Public Law II]* (C.F. Müller, 19th ed. 2003), 16-19. The usual distinction between civil, social and political rights corresponds only very vaguely to the distinction between *status negativus*, *positivus* and *activus*.

²⁹ Hermann Raschhofer, "Hauptprobleme des Nationalitätenrechts [Main Problems of the Law on National Minorities]" (Ferdinand Enke, 1931), 82-85 (theoretical discussion), 103-110 (assessing the inter-war treaties for the protection of minorities). Similarly, taking as a guide the distinction between 'negative' and 'positive equality', see Pablo de Azárate, *League of Nations and National Minorities: An Experiment* (Carnegie Endowment for International Peace, Washington D.C. 1945), 23-25, 57-91

additional constitutional safeguards.³⁰ Thus, tolerance versus promotion proves a useful conceptual distinction in sociolinguistic and legal assessments of minority language policies, since it takes into account the special needs of minorities.

Third, the fact that language rights belong to two different categories is of particular relevance with respect to its enforceable nature. On the one hand, language rights include the freedom to freely choose and to use one's language and to be free of interference in one's linguistic affairs and identity. This freedom of language does not require state intervention in order to be effectively enjoyed since it is immediately applicable. On the other hand, language rights may also include rights to receive all or some basic public services in a given language. Constitutional or statutory provisions dealing with these rights have different degrees of 'enforceability', ranging from self-executing to programmatic provisions. Although some can be enforceable to some extent, positive language rights tend to be drafted as programmatic provisions: they imply that the state is under a duty to act in order to make its citizens benefit from the rights constitutionally granted. In sum, the involvement of public authorities is necessary. Rights which depend on that kind of necessary involvement on the part of public authorities are respectively called *droits de créance*, *diritti di prestazione* and *Leistungsrechte* in the French, Italian and German legal orders. The general consequence thereof is that, insofar as the state does not make the rights effective through the law, individuals have no chance of obligating it to do so.

3. Language Rights in International Law

3.1. Are Language Rights an Integral Part of Human Rights?

As already indicated, many academic works take for granted what is, at best, questionable: that language rights are an integral part of human rights, in the sense of 'universal human rights' that generate obligations on states. This paper does not purport to research the eventual theoretical underpinnings of language rights as human rights,³¹ but to comment on the extent to which international law effectively does recognize language rights among international human rights guarantees.

Before exploring international law instruments, two preliminary general observations are called for. First, there appears to be some confusion between international human rights soft and hard law, above all in non-legal writings on linguistic rights. Soft law instruments (declarations, recommendations, etc.) have no treaty form and, therefore, are non-binding upon states. The 1992 UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities³² and the Organization for Security and Co-operation in Europe's 1998

30 In continental Europe there is less distrust than in the Anglo-American constitutional system towards the very idea of positive minority rights: for the causes of this different approach see Wojciech Sadurski, "Constitutional Courts in the Process of Articulating Constitutional rights in the Post-Communist States of Central and Eastern Europe, Part III: Equality and Minority Rights", European University Institute, EUI Working Paper LAW, 2003/6, March 2003), 23-26 at <http://cadmus.iue.it/dspace/bitstream/1814/201/1/law03-6.pdf>; for an account of those rights see, e.g., Jochem Abr. Frowein and Roland Bank, "The Participation of Minorities in Decision-Making Processes", 61 *Zeitschrift für Ausländisches und öffentliches Recht und Rechtsvergleichung* (2001), 1; and Gwendolyn Sasse, "The Political Rights of National Minorities: Lessons from Central and Eastern Europe", in Wojciech Sadurski (ed.), *Political Rights under Stress in 21st Century Europe* (Oxford University Press, Oxford, 2006), 239.

31 Dunbar, *Minority Language Rights* ..., 93-95.

32 Natan Lerner, "The 1992 UN Declaration on Minorities", 23 *Israel Yearbook on Human Rights* (1993) 111-128; Isse Omanga Bokatola, "La déclaration des Nations Unies sur les droits des personnes

Oslo Recommendations Regarding the Linguistic Rights of National Minorities (Oslo Recommendations) belong in this category. The reasons for the development of soft law are diverse. Soft law is useful in enunciating broad principles, in giving a broad sense of direction in new areas of law-making, where details of obligation remain to be elaborated. Soft law can also express standards and international consensus on the need for particular action, when unanimity is lacking in state practice and the will to establish hard law is absent.³³ In any case, it must be kept in mind that there is no gradation between hard law and soft law, but a binary system in which instruments are either law or they are not.³⁴

The second observation consists of a reminder of the basic consensual nature of international law formation, which basically applies also to human rights norms.³⁵ The list of international legal instruments is long, but most of them follow general principles of international law: as treaty rights, they are binding only upon the states that have ratified them, provided the ratification is not subject to a reservation concerning the right in question. There are a few linguistic human rights but some states have not abided to them, simply because they have not ratified the relevant instrument.

Although a great number of international human rights instruments have come to light since the Universal Declaration of Human Rights (UDHR) in 1948, the nature and extent of language rights granted by them all proves to be very limited. This is a fact generally admitted by human rights lawyers but one that often happens to be ignored by others. As systematic and thorough expositions of international law regarding minority language rights have already been presented in recent works,³⁶ I can limit myself to comment briefly on the state of affairs of that body of international law.

International human rights instruments provide a basic regime of linguistic tolerance, that is, protection against discrimination and various forms of assimilation (compulsory, degrading, etc.). This protection is not granted through specific *language* rights, but through *general* human rights such as a right to anti-discrimination measures, freedom of expression, of assembly and association and rights to respect for private and family life. These protections are granted to any individual, whether she is a member of a minority or not. The Human Rights

appartenant à des minorités nationales ou ethniques religieuses et linguistiques”, *Revue Générale de Droit International Public* (1993), 745-765.

³³ Dinah Shelton, “Compliance with International Human Rights Soft Law”, in Edith Brown Weiss (ed.), *International Compliance with Nonbinding Accords* (The American Society of International Law, Washington D.C. 1998), 119, 141. This work provides a typology of international human rights soft law.

³⁴ Dinah Shelton, “Mettre en balance les droits : Vers une hiérarchie des normes en droit international des droits de l’homme [Balancing Rights : Towards a Hierarchy of International Human Rights Norms]”, in Emmanuel Bribosia and Ludovic Hennebel (eds.), *Classer Les Droits De L’Homme* (2004), 153, 189. See also Oscar Schachter, “The Twilight Existence of Nonbinding International Agreements”, 71 *The American Journal of International Law* (1977), 296-304.

³⁵ For a hierarchy of international human rights norms see Shelton, *supra* note 34. See also, Venice Commission, *The Status of International Treaties on Human Rights* (Council of Europe, 2006).

³⁶ Patrick Thornberry, *International Law and the Rights of Minorities* (Clarendon Press, Oxford, 1991); Fernand De Varennes, *Language, Minorities and Human Rights* (Martinus Nijhoff Publishers, The Hague, 1996); Carlos R. Fernández Liesa, *Derechos Lingüísticos y Derecho Internacional* (Dykinson, 1999); Xabier Deop Madinabeitia, “Los Derechos Lingüísticos en el Derecho Internacional [Language Rights in International Law]”, 33 *Revista de Llengua i Dret* (2000), 23-45, at 23; Lauri Mälksoo, “Language Rights in International Law: Why the Phoenix is Still in the Ashes?”, 12 *Florida Journal of International Law* (2000), 432; Dunbar, *supra* note 17; José Woehrling, “L’évolution du cadre juridique et conceptuel de la législation linguistique du Québec [The development of the legal and conceptual framework of Quebec’s language legislation]”, in Alexandre Stefanescu and Pierre Georgeault (eds.), *Le français au Québec: les nouveaux défis*, Section 2 (2005), 253.

Committee (HRC) is the treaty body assigned with the supervision of the state-parties' compliance with the International Covenant on Civil and Political Rights (CCPR). In a case dealing with the right to commercial advertising in English language in francophone Quebec, the HRC declared:

A state may choose one or more official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one's choice.

For the HRC, English speaking citizens of Canada could not be considered a linguistic minority as they constitute a majority in the state. However, this does not mean that their linguistic behaviour is not protected by general human rights. In the aforementioned case, the HRC included outdoor commercial advertising in the scope of protection of freedom of expression.³⁷

The legal situation absolutely changes when we move from the area of tolerance to the area of use and promotion by public authorities. Here, legal obligations imposed on states are scarce and lack legal bite. As a matter of fact, there is no cogent obligation to positively support minority language maintenance or revitalization. The key—and isolated— provision in this regard is Article 27 CCPR:

In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Those few words constitute the only specific provision of binding international law with regard to the protection of speakers of minority languages.³⁸ It is obvious that this clause leaves many issues unresolved. For instance, there is some controversy on the extent of the rights granted by Article 27 CCPR: whether they are exclusively of a negative character (protection against interference)³⁹ or they include a state obligation to take positive measures on behalf of the members of minority groups.⁴⁰ Even authors that interpret the provision as imposing on states the obligation to take positive measures have to acknowledge that states are not obliged to give effect to any *specific* activity or measure.⁴¹

Article 27 of the Covenant on Civil and Political Rights is a weak article (...). Its lack of specificity means that, even though it may impose positive

³⁷ Communications Nos. 359/1989 and 385/1989, *Mcintyre v. Canada*, John Ballantyne, Elizabeth Davidson and Gordon, para. 11.1 and 11.2.

³⁸ Article 30 of the Convention on the Rights of the Child (CRC) reiterates the provision with regard to children, without added legal value. For an account of the omission of a special minority rights article in the Universal Declaration of Human Rights (UDHR), see Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press 1999), 269-280.

³⁹ Fernand de Varennes, *Language, Minorities and Human Rights*, 151-57; Christian Tomuschat, "Protection of Minorities" under Article 27 CCPR, in R. Bernhard, W.K. Geck, G. Jaenicke, and H. Steinberger (eds.), *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte* (1983), 949, 970.

⁴⁰ General Comment 23 of the UN Human Rights Committee (HRC) Fiftieth session, 1994, at para. 6.2; Thornberry, *International Law ...*, 141-247; Patrick Thornberry, "The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations, and an Update", in Alan Phillips and Allan Rosas (eds.), *Universal Minority Rights* (Abo Akademi University Institute for Human Rights, Abo, Finland; and Minority Rights Group International, London, 1995), 13, 24; Dunbar, *Minority Language Rights ...*, 107.

⁴¹ Patrick Thornberry, *International Law ...*, 387.

obligations on states to support minority identity, the article leaves a wide discretion to states on the modalities of its applications.

Nevertheless, if it is true that Article 27 CCPR does not specify what it entails, it does not follow that it is without consequence. Article 27 is not a programmatic provision or a statement of principle without mandatory force. As usual in international law, it is up to states to specify the measures necessary to comply with it. Article 27 identifies only the priority—respect and accommodation of the minorities’ characteristics: language, culture and religion—but it requires signatory states to articulate a policy to fulfil that obligation. To that effect, the number of linguistic minorities existing within the state’s boundaries cannot be irrelevant.⁴² As far as the relationship between international human rights law and internal constitutional and legal order becoming closer and closer, the practical role of domestic courts in enforcing international law obligations and interpreting domestic provisions in accordance with them should also increase.

It must be noted that Article 27 CCPR is not binding law for every signatory state. France made a reservation to Article 27, which has had the effect of depriving individuals in the *pays des droits de l’homme* of that provision’s limited protection. The *human* right to respect for one’s minority characteristics is *not* legally applicable to minorities living in France. Therefore, in France, members of minorities have to resign themselves to the protection awarded by general human rights. This circumstance highlights the *relative* status even of the major minority right under international law. The fact that a provision such as Article 27 CCPR is not generally endorsed by the community of states has some consequence for its role within the legal order of those states that have ratified it.⁴³

Similar conclusions are reached by other authors. In a recent survey on the issue, Robert Dunbar concludes that⁴⁴

it cannot be said that, even under these various instruments, language rights have been given the status of fundamental rights under international law.

José Woehrling arrives at a similar conclusion:⁴⁵

Jusqu’à présent, les garanties spéciales en matière d’usage officiel sont restées plutôt modestes.

For his part, Patrick Thornberry believes that⁴⁶

⁴² Dieter Kugelman, “Minderheitenschutz als Menschenrechtsschutz”, 39 *Archiv des Völkerrechts* (2001), 233, 242.

⁴³ In its 22/1996 judgment, the Italian Constitutional Court invoked this circumstance to exclude Article 27 CCPR from the field of application of Article 10 of the Constitution, which stipulates that the Italian legal system shall conform to ‘the generally recognized principles of international law’. Accordingly, Article 27 could not be incorporated as a reference for the constitutional review of laws. In addition, the Court invoked a second argument not to review domestic legislation in the light of Article 27: that its content only guarantees the use of the minority language with the members of the minority, but not to the external use of the language in relationships with individuals or authorities which do not belong to that minority.

⁴⁴ Dunbar, *Minority Language Rights* ..., 119. A similar conclusion in Deop Madinabeitia, *Los Derechos Lingüísticos* ..., 43; Mälksoo, *Language Rights* ..., 465; and Sandra del Valle, *Language Rights and the Law in the United States: Finding Our Voices* (Multilingual Matters, 2003), 336-341.

⁴⁵ Woehrling, *supra* note 36.

⁴⁶ Patrick Thornberry, *International Law* ..., 387.

the institution of minorities, in the sense of rules specifically directed at minorities and their members, survives [from the time of the League of Nations] only in a very attenuated form.

Dominique Rousseau, a French constitutional lawyer, who does not see major obstacles *from a philosophical point of view* in recognizing language rights as human rights, formulates the following warning:⁴⁷

Le fait que les droits linguistiques puissent être considérés comme des Droits de l'Homme, soit individuels, soit collectifs est très majoritairement contesté par l'ensemble de la communauté philosophique, politique, juridique.

Even advocates of 'linguistic human rights' do, at times, acknowledge this reality:⁴⁸

The existing international or 'universal' declarations are therefore in no way adequate to provide support for dominated, threatened languages. The evidence unmistakably shows that while individuals and groups are supposed to enjoy 'cultural' and 'social' rights, linguistic human rights are neither guaranteed nor protected.

By contrast, Fernand de Varennes has argued in a number of works that most of what today is called language rights constitutes authentic individual human rights as generally recognized in international law, such as the right to non-discrimination, to freedom of expression, to private life, and of members of a linguistic minority to use their language with other members of their community. In his opinion, these well-established human rights "provide a flexible framework capable of responding to many of the more important demands of individuals, minorities or linguistic minorities".⁴⁹ De Varennes's ideas deserve some attention since his works seem to support the above mentioned linguistic human rights approach of some non-legal scholars.⁵⁰

De Varennes wants to demonstrate that the belief that only certain categories of individuals such as national minorities have language rights is false. Language rights would not be a special category of rights, but well-established human rights. The purpose of this approach seems to be to present minority rights in a less threatening or confrontational perspective, in order better to accommodate them and to facilitate the compliance of states with them. It is clear that everyone, without being a member of a minority, enjoys general human rights with a linguistic dimension. However, it can be argued that too much emphasis on the human rights nature of language rights in general terms might suggest the opposite mistaken belief that everyone has, or should

⁴⁷ Dominique Rousseau, "La philosophie du droit [The Philosophy of Law]", in Henri Giordan (ed.), *Les Minorités en Europe: Droits Linguistiques et Droits de l'Homme* (Éditions Kimé, Paris, 1992), 79, 82. It is interesting to stress that this author notes the ambivalence of the conference from which the edited book was produced: "committed conference or scientific conference". This dilemma is typical in many works addressing the issue of language rights from a human rights perspective. That book bears the expressive subtitle of 'Droits linguistiques et droits de l'homme'.

⁴⁸ Skutnabb-Kangas and Philipson, *Linguistic Human Rights ...*, 89. Unfortunately, posterior works by the same authors forget or neglect that standpoint. Tove Skutnabb-Kangas, "(Why) should diversities be maintained? Language Diversity, Biological Diversity and Linguistic Human Rights", *Glendon Distinguished Lecture 2003* (on file with the author), at 23 claims that "it is clear that the fact that linguistic rights now are more or less accepted as part of human rights, even by human rights lawyers [and she mentions, among others, de Varennes and Thornberry and refers to the list provided at <http://www.unesco.org/most/ln2int.htm>], the fact that they are now linguistic human rights, is a major achievement". The emphasis is original.

⁴⁹ Fernand de Varennes, *Language, Minorities and Human Rights*, 275.

⁵⁰ However, there are many differences.

have the same language rights, since ‘most’ language rights derive from general human rights standards. Certainly, de Varennes does not suggest this. On the contrary, he makes a crucial distinction between the private use of a language by individuals and the use of a minority language by public authorities.⁵¹ Therefore, his claim that language rights are an integral part of human rights basically applies to the private sphere and to the right to an interpreter in criminal proceedings. It must be noted that the aspect of language rights that is most contested in democratic societies is not those instrumental rights generally recognized as human rights in international law, but the use and promotion of minority languages by public authorities.⁵² In this respect, de Varennes’s position is much more restrained.⁵³

There is not in the present state of international law or under European treaties an unqualified “right to use a minority language” or “right to language”.

In any case, he puts considerable hope in the juridical role of a well-established human right:⁵⁴

(...) non-discrimination on the ground of language may be the single most powerful right for individuals seeking more just and responsive conduct from public authorities in language matters. When properly understood and applied, non-discrimination offers a balanced mechanism which recognizes that a state may have legitimate reason for favouring one or a few select languages in carrying out its affairs. This includes such diverse factors as costs, desirability of a common language, available resources, etc. Non-discrimination is therefore a right which may take into consideration factors such as the objectives pursued by state authorities when they favour a particular language and its speakers, the degree of importance of the service or right involved, the number of individuals that are disadvantaged or inconvenienced by state’s policies, whether they are citizens, permanent residents or have a weaker attachment to the state, and even the geographic distribution of the affected individuals. Non-discrimination on the ground of language undoubtedly cannot respond to every demand in every circumstance, but it does offer a middle-of-the-road response that takes into consideration the interests of the state and of those individuals who have a language that differs from the official or majority language. No public authority or state institution can disregard the effect of its conduct on large numbers of speakers of other languages when providing benefits and services to the public. This implies that these benefits or services, in particular state provided or funded education must be available in the language(s) of these individuals in a degree which is roughly proportionate to their overall numbers.

Here, de Varennes admits a broad range of considerations and public interests that states may legitimately have regard to and invoke in order to reject the use of minority languages by public authorities. If this is so, and I believe it so, it seems that, concerning the use of minority languages by public authorities, there is no human right as such that could “tower above state behaviour”.⁵⁵ Does this not support the claim that positive, or non-instrumental, language rights

⁵¹ Fernand de Varennes, “Language Rights as an Integral Part of Human Rights”, 3 *International Journal on Multicultural Societies* (2001), 15, 17.

⁵² In this sense, Patten and Kymlicka, *Introduction: Language Rights ...*, 33 (“it is precisely these promotion rights which are at the heart of most language conflicts around the world”).

⁵³ Fernand de Varennes, *Language Rights ...*, 16.

⁵⁴ Fernand de Varennes, *Language, Minorities and Human Rights*, 276.

⁵⁵ Henry J. Steiner, “Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?”, in Philip Alston and James Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (2003), 15, 26.

have a different nature than general human rights? With the greatest respect for the contrary opinion, I do not think that, as a matter of international law as it now stands, language rights can be monolithically regarded as ‘well-established human rights’. In any case, it must be stressed that de Varennes’s position remains isolated in the relevant legal literature and does not appear to correspond with current international law.⁵⁶

3.2. *Explaining the Poor Status of Language Rights in International Law*

How can one explain the poor status of language rights under international human rights instruments? The traditional answer is well known. States are major actors in the context of international law. Many states deny the existence of minorities within their jurisdiction, or oppose the notion of minority protection in so far as the protection of language minorities is considered to affect adversely, or to risk, the state’s internal cohesion and national unity. For many states (as well as for supporters of nation-state ideology), minority rights contribute to maintain and to reproduce minority groups as distinct groups. Prohibiting discrimination and intolerance against linguistic minorities corresponds with most states’ interest, in so far as it helps to avoid the outbreak of internal conflicts that can affect other states’ and international security. Therefore, states can agree on a regime of linguistic tolerance, but a regime of linguistic promotion does not correspond with most states’ interest; at least, it can legitimately be doubted whether international peace and security can be better safeguarded by far-reaching minority language rights in international law.⁵⁷ There is no need to belabour this point, given that much has been said already about the ideologies supporting the reluctance of states to recognize minorities and to grant them rights.⁵⁸

The question arises as to whether, beyond the animosity or the lack of political will on the part of states, there is any reason inherent to the nature of language rights as rights. I tend to believe that this is the case. First, the number of languages in the world is around 6,000, the world population around 6 billion and the number of states almost 200: most states have many languages within their boundaries. These figures give a first impression of the difficulty of state management of linguistic diversity.⁵⁹ Kibbee has rightly reminded us that “a human rights approach is inherently universalistic and assumes a uniform set of circumstances which trigger application of corrective measures”, but that “circumstances are hardly universal”: “The problems of establishing universal rules of fairness in the interaction of people from different linguistic communities call into question the extent to which a human rights approach offers a solution to the inevitable conflicts between linguistic groups.”⁶⁰

⁵⁶ In this sense, explicitly, Woehrling, *supra* note 36: “Cette [Varennes’s] position reste actuellement minoritaire et ne correspond pas au droit international positif (ni d’ailleurs au droit constitutionnel interne dans l’immense majorité – voir la totalité – des États”.

⁵⁷ Mälksoo, *Language Rights ...*, 435-440, drawing from the experiences of pre-World War II minority protection. This author argues that since “both the denial of linguistic rights to the minorities and encouragement of their separate identities may threaten the sovereignty of the respective state”, states “avoid universal prescriptions at an advanced level and try to find fair and peaceful solutions for concrete circumstances [on] an ‘ad hoc basis’”.

⁵⁸ Supporting variations of that standpoint, see David D. Laitin, “Language Policy and Civil War” and Dominique Schnapper, “Linguistic Pluralism as a Serious Challenge to Democratic Life”, both in Philippe Van Parijs (ed.), *Cultural Diversity Versus Economic Solidarity* (De Boeck Université, 2004), 171 and 213.

⁵⁹ Eduardo J. Ruiz Vieytez, “Lenguas y Constitución: Una visión del Derecho lingüístico comparado en Europa [Languages and Constitutions: An Introduction to European Comparative Language Law]”, 72 *Revista Vasca de Administración Pública* (2005), 231, 232.

⁶⁰ Kibbee, *Presentation: Realism ...*13, xi.

Positive protection of language minorities or of languages themselves can not easily be translated into universal models applying to both industrialised and non-industrialised states; to homogeneously settled and to scattered minorities or nomadic and indigenous peoples; to large and to tiny linguistic communities; to aboriginal groups and to newcomers (migrants and refugees); to states with tens or hundreds of languages and states with very few languages; to minorities that speak languages that have standardized written forms and languages that lack them, and so on. Given that the conditions of states, languages and their speakers are so extremely different, it is difficult to elaborate international principles of linguistic promotion based on consensus. As Patten and Kymlicka have pointed, “[a]ny attempt to define a set of rights that applies to all linguistic groups, no matter how small and dispersed, is likely to end up focusing on relatively modest claims”.⁶¹

Second, public recognition of specific languages bears far-reaching consequences for the state. As noted by Laitin, “in a highly multilingual society, language policies that recognize all groups put heavy constraints on a young state, making more difficult the development of educational materials, the propagation of laws and administrative decrees, the production of national symbols, and the coordination of personnel throughout the country”.⁶² In a developed welfare state, it involves access to a wide range of public services such as legislation, education, culture, justice, public administration, health care and media through the medium of the recognized languages. Consequentially, public recognition of more than one official language demands a quantitatively and qualitatively higher involvement on the part of states than recognition and implementation of, say, freedom of religion. This implies a number of decisions that must be adopted by each society, in various levels of decision-making, and by the different branches of government. The issue cannot be decided upon a consensus among states.⁶³ Even if one accepts that the principle of equality obliges a government to provide public services in certain languages if there is a ‘reasonable’ number of speakers and if they are geographically concentrated, it is nevertheless up to each society to decide the specific balance between conflicting interests, democratic participation and substantive equality, on the one hand, and administrative efficacy, on the other. The principle of equality (or non-discrimination) is a general principle of law that needs to be concretized through the political process.

Human rights treaties provide the individual with certain guarantees against intrusions from the state. It is on the basis of a large consensus among states that human rights are proclaimed as such and included into an international treaty. Human rights are rights granted to a human being by virtue of the mere fact that he or she is human. Not every state that has ratified human rights’ principles effectively complies with them, but when this is the case, it will do its best to camouflage or to deny the facts or to persuade others that it is doing its best to comply with its obligations. Once human rights are proclaimed and become binding legal principles, they are located beyond the power of disposition of states parties; in other words, they ‘tower above state behaviour’.⁶⁴ When a state ratifies a human rights treaty, it agrees to a limitation of its sovereignty. This is so in theory. In practice, basic human rights norms show problems of

⁶¹ Patten and Kymlicka, *Introduction: Language ...*, 35. On the ‘variety of linguistic situations’ argument see Mälksoo, *Language Rights ...*, 448-454.

⁶² David D. Laitin, *Language Repertoires and State Construction in Africa* (Cambridge University Press, 1992), 63-64.

⁶³ Christina Bratt Paulston, *Epilogue: Some Concluding Thoughts ...*, 193 has pointed at “the very difficult question of who is to determine and legislate linguistic human rights. I can think of no satisfactory answer, probably because most language problems are emic, culture-specific in their nature, and defy universal guidelines”. In my view, it is within the political process where the most adequate language arrangements for each society should be discussed, argued and elaborated.

⁶⁴ Steiner, *Individual Claims ...*, 26.

indeterminacy and are susceptible of different meanings; they generate conflicts between rights and with competing governmental objectives (like the protection of national security).⁶⁵

By contrast, the most substantive part of language rights (those dealing with linguistic protection and not simply with linguistic tolerance) is a matter that is inevitably devolved to the political process within each society. Granting language rights to individuals implies assuming duties on the part of the government, which has to provide the personnel to facilitate linguistic services in administration, education, justice and so on. The conceivable options are many. That is why politics are essential in accommodating linguistic diversity, defining language rights and managing linguistic conflicts. The content of language rights is a product of the political process within each society; language rights do not stand as an undisputed condition for democratic management or for a management of linguistic diversity that complies with human rights standards. Acknowledging a state's leeway for formulating its language policy does not admit of the possibility that a state may opt for cultural and linguistic homogenization. The point is that, apart from certain basic guarantees, extended areas of language law are not covered by international human rights law. This is true especially with regard to language maintenance and promotion.⁶⁶ In this field, the contribution of international law can only be modest: delivering minimal standards and possibly insisting stronger on the democratic requirements for any management of linguistic diversity.⁶⁷

4. Regional Standards for the Protection of Linguistic Minorities

Attempts to formulate standards for the protection of minority languages or of linguistic minorities into regional instruments are also arduous, as the case of the legal instruments prepared under the auspices of the Council of Europe shows. The Framework Convention for the Protection of National Minorities (1995) (hereinafter "Framework Convention") and the European Charter for Regional or Minority Languages (1992) (ECRML), both prepared under the auspices of the Council of Europe, represent the most advanced notion of international minority protection available in the world today. I shall focus on the latter since its purpose deals more specifically with the protection of minority languages.⁶⁸

As the explanatory report indicates, the ECRML's overriding purpose is cultural. This is clear from the preamble to the ECRML: "the protection of the historical regional or minority languages of Europe, some of which are in danger of eventual extinction, contributes to the maintenance and development of Europe's cultural wealth and traditions". The explanatory report makes clear that

⁶⁵ *Ibid.* Recently, Carozza has argued "a subsidiarity-oriented understanding of human rights and international law", which "should rely primarily on the most local body capable of giving meaning and effect to human rights and accord authority and responsibility to larger, more comprehensive bodies to intervene so as to assist in the realization of human rights". See Paolo G. Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law", 97 *American Journal of International Law* (2003), 38.

⁶⁶ Many scholars and minority rights activists tend to think the other way and they have every expectation in international standards regarding minority protection.

⁶⁷ See also Mälksoo, *Language Rights ...*, 465. This author concludes that "the current approach [among states and scholars] seems to be that international law can only set minimum standards, and the situations of linguistic injustice must be fought with the tools of domestic and international politics".

⁶⁸ Jean-Marie Woehrling, *The European Charter for Regional or Minority Languages: A Critical Commentary* (Council of Europe Publishing, Strasbourg, 2005); Patrick Thornberry and María Amor Martín Estébanez, *Minority Rights in Europe: a Review of the Work and Standards of the Council of Europe* (Council of Europe Publishing, Strasbourg, 2004), Chapter 3.

The charter sets out to protect and promote regional or minority languages, not linguistic minorities. For this reason emphasis is placed on the cultural dimension and the use of a regional or minority language in all the aspects of the life of its speakers. The charter does not establish any individual or collective rights for the speakers of regional or minority languages.

The question immediately arises as to whether the ECRML can qualify as a human rights instrument.⁶⁹ This is not a theoretical issue, since human rights law is considered to enjoy primacy over other bodies of norms in international law.⁷⁰ Even if it is conceded that protection of minority languages is a desirable policy goal, it does not automatically follow that that protection should be enshrined as rights, whether individual or collective. The genesis of the ECRML may lie in the observed shortcomings within the European Convention on Human Rights and Fundamental Freedoms (ECHR) system with regard to safeguarding the rights of minorities to enjoy their own culture, to use their own language, to establish their own schools and so on; but the alternatives available are many. In fact, the framers of the ECRML decided to remedy these shortcomings, but without appealing to a rights-based approach. States have preferred enhancing the protection of regional and minority languages through objective measures. The ECRML breaks the field of protection of regional and minority languages into manifold measures in order to construct a comprehensive framework that should match as closely as possible the needs of protection and interests of each particular language as well as the needs and wishes expressed by the groups which use such languages.

The ECRML's contribution is not inconsiderate. As the first international legal instrument devoted to the protection of minority languages, it has pioneering attainments. It considerably advances the standards of protection in areas where universal instruments are very deficient. The ECRML "goes beyond other instruments in interlacing the public space with a complex of language requirements".⁷¹ Unlike many recommendations, declarations or resolutions, it is a binding instrument; and there is an advisory committee to monitor its enforcement.

By contrast, if one evaluates the ECRML—whether consciously or not—from a human rights or minority rights perspective, one's assessment will tend to be unfavourable and the ECRML will be consequentially reported as having egregious deficiencies.⁷² First, it does not guarantee enforceable rights, neither individual nor collective, but it encourages states to take measures to protect regional or minority languages.⁷³ As indicated, the aim of the ECRML is not to guarantee human rights *per se*, but the protection of regional and minority languages as an integral part of the European cultural heritage. Second, it allows each state that ratifies the ECRML to specify which minority or regional languages it wants to include within the scope of the ECRML (Art. 3 (1)). Signatory states are allowed to differentiate, if they wish, among their

⁶⁹ Snežana Trifunovska states that "the Framework Convention and [I]CCPR are clearly human rights treaties, whereas the European Charter focuses on the cultural dimension and function of language". See Snežana Trifunovska, "Monitoring of Linguistic Rights of Minorities under the European Charter and the Framework Convention", *II Mercator International Symposium* (Tarragona, February 2004), at p. 1.

⁷⁰ On the primacy of human rights law see Shelton, *Mettre en balance les droits ...*, 189-193.

⁷¹ Thornberry and Martín Estébanez, *Minority Rights ...*, 159.

⁷² Robert Dunbar, "Implications of the European Charter for Regional or Minority Languages for British Linguistic Minorities", *25 European Law Review, Human Rights Survey 2000* (2000), 46.

⁷³ The Austrian Administrative Supreme Court has ruled that, according to Article 50(2) of the Constitution, the Charter provisions are not immediately applicable, and that such an international treaty only imposes obligations on the legislature. See Judgment of 23 May 2005, No. 2005/06/0030.

regional or minority languages, although this option should be nonarbitrary.⁷⁴ Third, states can choose which paragraphs or subparagraphs they want to apply: they have to choose a minimum number of 35 paragraphs or subparagraphs out of 97 options (a sort of signature *à la carte*). Four, obligations are accompanied by many caveats (as far as possible, where necessary, if the number of user justifies it) allowing states a considerable margin of appreciation. As a result, varying degrees of stringency have been made possible: from adopting just the required minimum number of the least incisive provisions until signing the whole panoply or the most obliging provisions.

The point is that the ECRML does not aspire beyond defining ‘the’ rights of linguistic minorities, but rather limits itself to providing the rudiments for developing context-based standards of protection of regional or minority languages: the context-based varying standards established by the ECRML should be adjusted by the states to the needs of each particular language, taking account of the needs and wishes expressed by the group which speak it.

A similarly reticent view has been explicitly endorsed by the ECHR with regard to the Framework Convention.⁷⁵ In a non-linguistic case dealing with the lack of suitably equipped sites for the Gypsy community to station their caravans, the ECHR was urged by the applicant to take into account recent international developments for the protection of minorities. The Court acknowledged that⁷⁶

there may be said to be an emerging international consensus amongst the Contracting states of the Council of Europe recognizing the special needs of minorities and an obligation to protect their security, identity and lifestyle (see paragraphs 55-59 above, in particular the Framework Convention for the Protection of National Minorities), not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community.

However, in the view of the Court, that ‘emerging international consensus’ does not yet give form to recognizable standards.⁷⁷

the Court is not persuaded that the consensus is sufficiently concrete for it to derive any guidance as to the conduct or standards which Contracting states consider desirable in any particular situation. The Framework Convention, for example, sets out general principles and goals but the signatory states were unable to agree on means of implementation.

Unfortunately, despite the conscious omission of individual and collective rights and its commendable technical and non-confrontational approach to minority language issues, some European states have not signed or ratified the ECRML. Even not all EU member states or candidate states have signed or ratified it: Belgium, Bulgaria, Estonia, Greece, Ireland, Latvia,

⁷⁴ As Creech, *Law and Language ...*, 136 puts it, the Charter “may be seen as allowing the fox to not only guard the proverbial chicken coop, but to choose which chicken he will guard and which ones he will turn into cordon bleu”.

⁷⁵ Marc Weller, *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities* (Oxford University Press, Oxford, 2005).

⁷⁶ *Chapman v. The United Kingdom*, 33 EHRR.18, para. 93.

⁷⁷ *Chapman v. The United Kingdom*, 33 EHRR 18, para. 94. The Court recognized that Article 8 ECHR imposes on the Contracting states a positive obligation to facilitate the Gypsy way of life, although not such “a far-reaching positive obligation of general social policy” like making available to the Gypsy community an adequate number of suitably equipped sites (para. 96 and 98).

Portugal and Turkey have not signed the ECRML, and France, Italy, Lithuania, Luxemburg, Malta and Romania have not yet ratified it.

5. Language Rights in Domestic Law

The status of language rights in domestic law can be examined from a broad constitutional perspective or, more specifically, from the perspective of fundamental rights. My comparative research inevitably concerns only a selection of legal orders, with the focus on recent constitutional developments.

5.1. *Language Rights and Constitutional Order*

Language has relevant social and political dimensions, and constitutions, as higher norms of states, usually do not forget to include provisions on the matter. The constitutions of 173 states of the world indeed include some provisions related to language.⁷⁸ Only 22 states have no constitution or no constitutional provisions related to language.⁷⁹ In Europe, the proportion is 37 to 9.⁸⁰ In many of the cases of lacking a constitutional formal recognition of an official language, there is no doubt with regard to the existence of a *de facto* official language.⁸¹

Having constitutional provisions related to language does not imply recognizing rights other than the official language. Most constitutions simply proclaim a given language (or a number of languages) as the state, official, or national language(s). Some constitutions limit themselves to expressly prohibit language as a ground of discrimination (e.g. German Constitution, art. 3). Even in the case of a proclamation of official status, it is not clear what the legal effects are. There is no common accepted definition of the notion of official status. A variety of legal arrangements from state to state can be connected to an official status.⁸² In general terms, the

⁷⁸ For a list of the constitutional provisions dealing with language, see the web site of the UNESCO MOST Programme at <http://www.unesco.org/most/ln2nat.htm>. For a screening of those provisions to identify language obligations and rights, see Eduardo D. Faingold, "Language Rights and Language Justice in the Constitutions of the World", 28 *Language Problems & Language Planning* (2004), 11. For an extensive catalogue of language legislations of the world, see the web site of the International Research Centre on Language Planning at <http://www.ciral.ulaval.ca/alx/amlxmonde/accmonde.htm>

⁷⁹ Angola, Australia, Bhutan, Chile, Czech Republic, Denmark, Dominican Republic, Guinea Bissau, Iceland, Israel, Japan, Korea (Republic of), Myanmar, Netherlands, San Marino, Sierra Leone, Swaziland, Tonga, Trinidad and Tobago, United Kingdom, United states of America, and Uruguay. See <http://www.unesco.org/most/ln2nat.htm>

⁸⁰ Ruiz Vieytes, *supra* note 59. This author includes among the European states lacking constitutional provisions on language two states (Vatican, and Serbia and Montenegro) that were not considered by MOST, as well as Luxembourg, where the Constitution limits to declare that "the law will determine the use of languages in administrative and judicial matters" (Article 29). That provision apparently deconstitutionalizes the rules on the use of language. In fact, recognition of official and national languages takes place only in the legal order. However, the current wording of Article 29 of the Constitution of Luxembourg originates from the constitutional revision of 6 May 1948, which, after the German occupiers' imposition of Standard German and prohibition of French in WWII, aimed precisely at empowering the legislature to make Lëtzebuergesch official language alongside with French and German. In addition, the Law of 24 February 1984 on the language regime declared Lëtzebuergesch national language of Luxembourg. See Pierre Majerus, *L'État luxembourgeois* (Editpress, 1990), 106-107.

⁸¹ This is the case, for instance, of Germany: see Paul Kirchhoff, "Deutsche Sprache [German Language]", in Josef Isensee and Paul Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland I* (1995), 745, 761.

⁸² On the notion of official status as a legal category, see Ruiz Vieytes, *Lenguas y Constitución ...*, 252-270.

proclamation of official status itself does not produce legal effect, although it can be the basis for recognition of language rights through legislation.⁸³ Similarly, acknowledging linguistic diversity or the contribution of various languages to the cultural and linguistic richness or to the cultural heritage of society as a whole does not imply the recognition of language rights to the speakers of the languages concerned.

The constitutionalization of language rights is not an established constitutional pattern. We find examples in few cases (such as Finland or Canada).⁸⁴ Constitutional provisions may establish language protection, maintenance or promotion as a public policy goal: however, these provisions do not provide language rights, but policy guidelines. This kind of provisions has a 'programmatic' or directive character. It is the implementation of them through legislation which, in some cases, can lead to the recognition of individual or collective rights. The Austrian Constitutional Court has repeatedly affirmed that the constitution-making power had taken an "axiological decision" in favour of protection of minorities.⁸⁵ Now, after the reform of 2000, the idea is explicitly laid down in the constitutional text. However, constitutional recognition bears no legal consequence in practical terms, although obviously it cannot be said that it is legally irrelevant. In general terms, constitutional provisions that contain or express state objectives do not recognize subjective rights: they orient the legislative action and proclaim values that should unite the state's community.⁸⁶

Similarly, the Italian Constitutional Court has reiterated that the protection of linguistic minorities, which includes the right to use one's mother tongue within the minority community, is one of the constitutional order's fundamental principles.⁸⁷ Interestingly, this Court has expressly stated that, on the basis of constitutional principles and international law, the most complete realization of the protection of linguistic minorities, under the perspective of the use of the minority language, would consist of allowing members of that minority, within their territory of settlement, not to be constrained to use a language different from their mother tongue in their relationships with public authorities. However, the Constitution does not directly grant a right of this kind, but rather merely imposes on the legislature and other authorities of the Republic the duty to ensure the use of minority languages. The case-law on Article 6 of the Constitution ('The Republic protects linguistic minorities with special laws') as well as similar provisions contained in the regional statutes is quite sophisticated. Those provisions are considered to have a double nature. On the one hand, they qualify as 'directives with differed applicability' (*norme direttive ad efficacia differita*), in the sense that the legislator, according to its discretion, has the choice of the form, timing and methods in order to achieve the constitutional objective, taking account of the existing social conditions and of the availability

⁸³ Pierre Foucher, "Le Droit et les Langues en Contact: du Droit Linguistique aux Droits des Minorités Linguistiques [Law and Languages in Contact : From Language Law to Rights of Language Minorities]" in Anette Boudreau, Lise Dubois, Jacques Maurais, and Grant McConell (eds.), *L'Ecologie des langues / Ecology of Languages* (2002), 43, 57.

⁸⁴ Those language rights will be analyzed in the following section from the perspective of fundamental rights.

⁸⁵ Judgment 9.224/1981 ('Wertentscheidung des Verfassungsgesetzgebers zugunsten des Minderheitenschutzes').

⁸⁶ Dieter Kolonovits, *Sprachenrecht in Österreich (Language rights in Austria)* (Manz, 1999), 512.

⁸⁷ See, e.g., Judgment 298/1987 ("uno dei principi fondamentali dell'ordinamento costituzionale che si pone come limite e al tempo stesso come indirizzo per l'esercizio della potestà legislativa (e amministrativa) regionale e provinciale nel Trentino-Alto Adige"), Judgment 5/1992 ("il diritto all'uso della lingua materna nell'ambito della comunità di appartenenza è un aspetto essenziale della tutela costituzionale delle minoranze etniche, che si collega ai principi supremi della Costituzione") and Judgment 22/1996 ("rappresenta un superamento delle concezioni dello Stato nazionale chiuso dell'Ottocento e un rovesciamento di grande portata politica e culturale, rispetto all'atteggiamento nazionalistico manifestato dal fascismo").

of organizational and financial resources for its implementation. Constitutional provisions may ground subjective and enforceable rights insofar as the necessary norms and measures of implementation have been adopted.⁸⁸ On the other hand, the rights' provisions also provide for a minimum protection that is immediately applicable: this minimum protection includes the right to use the minority language and to obtain from the authorities a response in that language, both in oral communications, directly or by virtue of an interpreter, and in written correspondence, by virtue of a translation into the minority language accompanying the Italian text.⁸⁹

Nevertheless, a significant number of modern European constitutions from Central and Eastern Europe (CEE) *do* recognize some positive language rights. New democracies of CEE have embraced not only the major instruments of international protection of minorities, but, to some extent, also the major tenets of constitutional protection of minorities. This model of constitutionalizing language rights other than related to the state language is not common to Western European states. This is probably the most significant difference between post-communist countries' bills of rights and traditional European constitutionalism.⁹⁰ Political pressure and moral suasion from Western states have contributed to generous recognition of language rights within modern CEE constitutions. The need of 'respect for and protection of minorities' was a prerequisite imposed on CEE countries in order to, first, accord them a 'democratic blessing' and, second, to accept their accession to European international organizations such as the Council of Europe and the European Union. In pressing CEE countries to legally recognize and protect minorities, most Western European states have certainly endorsed a practice of double standards.⁹¹ Minority protection is often a product for export, but not to be consumed domestically.

The provisions granting language rights (or language-related rights) contained in the constitutions of CEE countries can be classified in five groups:⁹²

- a. The right to freely use one's own language;
- b. The right to preserve one's linguistic identity;
- c. The right to be educated in one's own language;
- d. The right to use one's own language in the communication with some specific institutions;
- e. Other rights.

The first and second categories of rights consist of express proclamation of principles and values already embedded in general human and fundamental rights. They express freedom of language, that is, the freedom to freely choose and use one's language and to be free of

⁸⁸ Judgment 5/1992. In the 22/1996 judgment, the Court stressed and denounced the absent legal implementation of the relevant provision of the regional statute for Friuli-Venezia Giulia, although thirty years had already elapsed since its promulgation.

⁸⁹ Judgments 5/1992 and 22/1996.

⁹⁰ For a general overview, see Wojciech Sadurski, "Postcommunist Charters of Rights in Europe and the U.S. Bill of Rights", 65 *Law and Contemporary Problems* (2002), 223; Wiktor Osiatynski, "Rights in new Constitutions of East Central Europe", 26 *Columbia Human Rights Law Review* (1994), 111. Especially for minority and language rights, see Sadurski, *Constitutional Courts ...*, 16-40.

⁹¹ On the EU conditionality and the 'double standards' issue, see Bruno de Witte, "Politics versus Law in the EU's Approach to Ethnic Minorities", European University Institute, RSC Working Papers, RSC No. 2000/04, 2000; Frédéric Van den Berghe, "The European Union and the Protection of Minorities: How Real is the Alleged Double Standard?", 22 *Yearbook of European Law* 2003 (2004), 155; Gwendolyn Sasse, "EU Conditionality and Minority Rights: Translating the Copenhagen Criterion into Policy", European University Institute, EUI Working Papers, RSCAS No. 2005/16, March 2005, at http://cadmus.iue.it/dspace/bitstream/1814/3365/1/05_16.pdf.

⁹² Ruiz Vieytez, *Lenguas y Constitución ...*, 237-238.

interferences in one's linguistic affairs and identity (see below for freedom of language as a fundamental right). The fifth category is a sort of box for a heterogeneous set of rights such as participation rights. The third and fourth categories are most interesting, because they provide rights that impose on governmental institutions a positive duty to offer education or to communicate with members of minorities in their own language. The provisions show differences in wording, structure and scope: some are more categorical than others; many carry the *caveat* "under conditions defined by law" or "in accordance with law"; in some cases, it may be doubtful on the basis of provision alone whether the minorities have a right to *public* education—that is, provided by the government—in their own language. Despite existing limitations they appear rather unequivocal in their meaning.

The most categorical proclamation is found in Article 34(2) of the Slovak Constitution:

In addition to the right to learn the official language, the citizens of national minorities or ethnic groups shall, under conditions defined by law, also be guaranteed:

- (a) the right to be educated in a minority language,
- (b) the right to use a minority language in official communications,
- (c) the right to participate in decision-making in matters affecting the national minorities and ethnic groups.

This provision draws inspiration from Article 25 of the Charter of Fundamental Rights and Basic Freedoms approved by the Czechoslovakian Federal Assembly, which came into force on February 1991 and was applicable in Slovakia's territory until its peaceful secession from Czechoslovakia.⁹³ Unfortunately, the Slovak constitution-maker added a new paragraph to Article 34, which drastically lessens the overall positive impression given by the provisions taken from the Czechoslovakian Charter. The new Article 34(3) sets clear limits on the demands of territorial autonomy by minorities and rules out positive discrimination (affirmative action) that would equalize the opportunities afforded to minorities.⁹⁴

After the disintegration of Czechoslovakia, the resolution of the Presidium of the Czech National Council of 16 December 1992 declared the Charter of Fundamental Rights and Basic Freedoms as a part of the constitutional order of the Czech Republic. Article 25 of the Charter recognizes:

- (1) Citizens who constitute a national or ethnic minority are guaranteed all-round development, in particular, the right to develop, together with other members of the minority, their own culture, the right to disseminate and receive information in their native language, and the right to associate in national associations. Detailed provisions shall be set down by law.
- (2) Citizens belonging to national and ethnic minority groups are also guaranteed, under the conditions set down by law:
 - a) the right to education in their own language,
 - b) the right to use their own language when dealing with officials,
 - c) the right to participate in the resolution of affairs that concern national and ethnic minorities.

⁹³ Mahulena Hoškova, "Die Charta der Grundrechte und Grundfreiheiten der ČSFR [The Charter of Fundamental Rights and Freedoms of Czechoslovakia]", 18 *Europäische Grundrechte Zeitschrift* (1991), 369; Osiatynski, *Rights in new Constitutions* ..., 117-118.

⁹⁴ Osiatynski, *Rights in new Constitutions* ..., 132; Sadurski, *Constitutional Courts* ..., 15. Article 34(3) reads: "The enactment of the rights of citizens belonging to national minorities and ethnic groups that are guaranteed in this Constitution must not be conducive to jeopardizing the sovereignty and territorial integrity of the Slovak Republic or to discrimination against its other inhabitants."

The right to be educated in a minority language or in one's mother tongue is also granted in Albania (Article 20(2)), Azerbaijan (Article 45), Belarus (Article 50), Hungary (Article 68 (2)),⁹⁵ Macedonia (Article 48(2), with regard only to primary and secondary education); Moldova (Article 35(2)), Romania (Article 32(3), Russia (Article 26(2) and Ukraine (Article 53); the Bulgarian Constitution just recognizes the right to study one's own language (Article 36(2)). The Estonian Constitution only expressly recognizes the right of educational institutions established for ethnic minorities to choose their own language of instruction (Article 37(4)).

On the contrary, the right to use a minority language in official communications is less generously granted.⁹⁶ Apart from the already mentioned Czech and Slovak cases, only the Estonian Constitution in Article 51(2) recognizes a right in this field, although it does it in rather restrictive terms:

In localities where at least half of the permanent residents belong to an ethnic minority, all persons shall have the right to receive answers from state and local government authorities and their officials in the language of that ethnic minority.

In sum, it can be concluded with Sadurski that "the tension between the establishment of an official (state) language and the right to use, in official contexts, minority languages when minorities are relatively sizeable and territorially identifiable, remains a constant theme in a number of countries in the region".⁹⁷

It is interesting to mention another case of abrupt constitutional change of the political and legal system. The Constitution of South Africa (1996) not only declares eleven official languages (Afrikaans, English, plus nine indigenous languages) that should be accorded "parity of esteem and must be treated equitably" and recognizes the special needs of promotion and development of indigenous languages according to their "historically diminished use and status", but also commits the authorities to promote and ensure respect for many other languages used in South Africa, such as the Khoi, Nama and San languages, sign language, German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telugu and Urdu (Section 6). In addition, the Constitution proclaims in light with Article 27 CCPR that "(p)ersons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community (a) to enjoy their culture, practise their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society" (Section 31). However, when it comes to recognizing educational language rights, hard choices need to be made: the right to receive an education in the language of one's choice does not exist regardless of the linguistic communities' size and status. Educational language rights are restricted to the eleven official languages.⁹⁸ And even with regard to those languages, the Constitution is very cautious in Section 29(2) and subjects the recognition of educational language rights to practicability:

⁹⁵ It can be disputed whether Article 68(2) of the Constitution of Hungary effectively grants a subjective right to mother-language-medium education to national and ethnic minorities or just imposes on the state a directive provision.

⁹⁶ It must be noted that statutory acts on the exercise of constitutional rights may provide for a more generous regulation.

⁹⁷ Sadurski, *Constitutional Courts* ..., 29.

⁹⁸ As one commentator has noted, "it is inconceivable that the state could guarantee all those living within its territory the right to special educational arrangements as such a claim would place a disproportionate burden upon the financial resources of the state". See Managay Reddi, "Minority Language Rights in South Africa: a Comparison With the Provisions of International Law", 35 *The Comparative and International Law Journal of Southern Africa* (2002), 328, 341.

Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account

- (a) equity;
- (b) practicability; and
- (c) the need to redress the results of past racially discriminatory laws and practices.

What are the justifications for recognizing language rights by constitutional law? The point being made in this paper is that recognition of language rights (as such or as part of minority rights) is based primarily on contingent historical reasons.⁹⁹ In other words: “The specificity of each context will determine where the line is drawn between idealism and realism in linguistic struggles.”¹⁰⁰ Consequentially, each case should require telling a specific story. Nevertheless, I point at three basic historical processes that make language rights emerge as a central feature of the constitutional order:

a) In the first model, recognition of language rights is based on a fundamental political decision of the state. This decision is dependant on the size¹⁰¹ and on the extent of existing linguistic communities’ influence capacity on state-building or re-building, of nationalist demands from existing linguistic communities, or of a mixture of both. When states confront a sort of competing nationalism, “the best way to promote a common identity and to encourage the practice of deliberative democracy may be to adopt policies that recognize and institutionalize a degree of national and linguistic difference”.¹⁰² In this sense, language rights are special guarantees accorded to citizens as a ‘natural’ part of state-building or re-building arrangements, or as part of a legitimacy bargaining a post-dictatorial or post-racist state needs to make: if the state wants to have citizens’ trust, it has to provide for language rights. Thus, language rights are compromised rights of a fundamental sort.¹⁰³ This characterization needs two clarifications. First, that constitutional language rights may result from a political compromise is not a characteristic that uniquely applies to such rights.¹⁰⁴ Second, that language rights are created as a result of a constitutional bargain does not mean that they do not have a distinctive moral justification.¹⁰⁵ In any event, here, the role of language rights is *internal* peace keeping: avoiding political struggles that can lead to disintegration of the state. This is the case of, for instance, Switzerland, Canada, Finland, Belgium, Spain or South Africa.¹⁰⁶

⁹⁹ This point is elaborated by Foucher, *supra* note 83; see also Kibbee, *supra* note 13.

¹⁰⁰ Kibbee, *supra* note 13, xvi.

¹⁰¹ On the relevance of size, see Green, *Are Language Rights Fundamental?* ..., 664-6 (“the *realpolitik* of numbers is relevant to fundamental language rights”) and Réaume, *Official-Language Rights* ..., 266-8.

¹⁰² Patten and Kymlicka, *Introduction: Language Rights* ..., 41. More generally, Brendan O’Leary has argued that “a democratic federation without a clear *Staatsvolk* must adopt (some) consociational practices if it is to survive”. See Brendan O’Leary, “An Iron Law of Nationalism and Federation?”, 3 *Nations and Nationalism* (2001), 273, 291.

¹⁰³ Green, *Are Language Rights Fundamental?* ..., 669.

¹⁰⁴ *R. v. Beaulac*, 1 S.C.R. 768 (1999).

¹⁰⁵ For some scholars, the moral foundation of language rights is linguistic security. The security justification has two aspects: “First, speaking a certain language should not be a ground of social liability; and second, one’s language group should flourish.” (Green, *Are Language Rights Fundamental?* ..., 658-60; see also, Réaume, *Official-Language Rights* ..., 252).

¹⁰⁶ For the view of language rights as peace-keeping mechanisms see Kibbee, *supra* note 13, xv; Rousseau, *Le français au Québec* ..., 81-82. An important series of case studies stress from the very title the idea that language arrangements in multilingual settings tend to be the product of a fundamental

b) In the second model, recognition of language rights is explicitly ruled by an international or an inter-state agreement. This model refers to border territories that, in recent times, mostly in the twentieth century, have changed from one state's hands to another's (Åland Islands, border areas between Germany and Denmark, South Tyrol, and Slovenian minority in Italy), or to states that, in order to regain sovereignty, had to subscribe to a set of international obligations, including provisions for the protection of minorities (Austria). Here, the role of language rights is *international* peace-keeping: avoiding conflicts in new incorporated or near-border areas or assuming obligations as a means to achieve state's independence.¹⁰⁷ The extension of language rights is limited to a relatively small part of the state's territory: the international/inter-state basis of this model of recognition of rights has a limited scope, a given ethnic group in a certain territory; it does not prevent the respective state from denying language rights to other linguistic communities settled in other territories. For a long time, minorities protected by specific international treaties or bilateral agreements of this kind were considered relatively secure and privileged in comparison to other minorities.

c) Finally, the third model of constitutional recognition of language rights corresponds to the new constitutionalism of CEE countries. Common features of this model include: language rights are recognized as part of a more comprehensive minority rights pack; minority rights tend to balance the harsher aspects of a recovered or new founded nation-state ideology. In many cases, there is a correlation between international obligations and constitutional provisions: in this sense, constitutional provisions dealing with minorities exist to the extent of complying with international law obligations (the Council of Europe's Framework Convention and the Language Charter, or the Copenhagen criteria). Besides, some states such as Germany, Hungary and Rumania have produced a net of bilateral agreements with selected CEE countries, which oblige the contracting parties to protect or to adopt measures in favour of specific minorities.¹⁰⁸ Justifications of recognition of language rights constitute a convoluted mixture of intrastate, supranational and reciprocal considerations: preventing from internal and regional conflicts, democratic consolidation and accession to Europe, and good relations with neighbour states. For the time being, the efficacy of those provisions protecting minorities and granting language rights still remains to be established. Constitutional rights need to be firmly rooted in social and cultural practices; otherwise, legal imposition of rights has only a limited effect. Societies and governments may show little willingness to conform to the prescribed norms. Faced with the failure to enforce international obligations and/or constitutional provisions, the intervention of constitutional courts may be demanded. Constitutional courts of CEE states will have to accomplish a major task to enforce constitutional provisions before governments that could be tempted to ignore the obligations history has called on them to accept.¹⁰⁹ Now, it may be

compromise: see Kenneth D. McRae, *Conflict and Compromise in Multilingual Societies, (with volumes devoted to Switzerland, Belgium and Finland)* (Wilfried Laurier University Press, Canada, 1983, 1986 & 1997).

¹⁰⁷ See the words of Pablo de Azcárate, *League of Nations* ..., 14: "The protection of minorities instituted by the treaties of 1919 and 1920, whose application was entrusted to the League of Nations, was not ... humanitarian, but purely political. The object ... was to avoid the many inter-state frictions and conflicts which had occurred in the past, as a result of the frequent ill-treatment or oppression of national minorities."

¹⁰⁸ For a not too favourable balance of those treaties, see Kinga Gál, "Bilateral Agreements in Central and Eastern Europe: A New Inter-State Framework for Minority Protection?", European Centre for Minority Issues, ECMI Working Paper #4, May 1999 at http://www.ecmi.de/download/working_paper_4.pdf.

¹⁰⁹ Foucher, *Le droit et les langues* ..., 61-2 elaborates the point in general terms, but with the Canadian experience in mind; see also Xabier Arzoz, "Señalización Viaria y Lenguas Minoritarias: Algunas Reflexiones en Torno a la Sentencia del Tribunal Constitucional Austriaco Sobre la Señalización Bilingüe en Carintia [Highway Signage and Minority Languages: Reflections on the Austrian Constitutional Court's Ruling on Bilingual Signage in the Land of Carintia]", 40 *Revista de Llengua i Dret* (2003), 109.

premature to consider whether this recent wave of constitutionalization of language rights will become a new pattern in comparative constitutional law or it will remain isolate in the future, as happened to the treaties on minorities drafted after the First World War, which were devised basically for Central European and Balkan states.

5.2. *Are Language Rights Fundamental Rights?*

A more theoretic discussion concerns the fundamental rights character of language rights. Fundamental rights (*Grundrechte, libertés publiques*) are a particular category of constitutional rights that some legal orders are familiar with.¹¹⁰ The category encompasses a number of individual legal positions whose recognition is regarded as central for a given political system and which, consequentially, are located beyond the reach of political process, that is, beyond majority rule. In other words, legislators are bound to respect and protect fundamental rights, with the consequence that courts can declare a legislative act to be incompatible with constitutional provisions including fundamental rights and, therefore, invalidate it. Furthermore, fundamental rights are usually more strongly protected than legal rights or even than ‘ordinary’ constitutional rights. Some constitutions create constitutional courts for the sake of the protection of fundamental rights *vis-à-vis* public power including the democratic legislature.

The contemporary debate on language rights has developed three approaches as to their character as fundamental rights. The three approaches are not inconsistent with each other: for instance, the first one combines perfectly with either the second or the third one.

a) One approach resorts to the minimal position of language rights as fundamental rights. Although language rights cannot be confused with fundamental rights, they do not constitute separate worlds. Moreover, fundamental rights have a role to play to protect linguistic diversity.¹¹¹ Arguably, many fundamental rights have an implied linguistic dimension. Freedom of speech includes freedom to choose the language of speech. The right to respect for private and family life includes respect for cultural practices and language spoken with and within the family, in the household and, more generally, in the private sphere. The right to fair trial requires that the accused person understand the accusation; therefore, if she does not understand the language of the court, she must be provided with an interpreter. These fundamental rights with a linguistic dimension tend to be, explicitly or implicitly, universally recognized. The enjoyment of those rights is accorded to everyone, whatever the language she speaks or the place she is.

Freedom of language would be the major expression of the minimal position of language rights as fundamental rights. As a regime of linguistic tolerance does not usually require language-specific legislation, nor does freedom of language require specific constitutional recognition. Occasionally, some constitutional orders explicitly recognize freedom of language (*Sprachenfreiheit, liberté de la langue*). This explicit recognition happens to be one of the features of ‘openly multilingual’ legal orders, where the explicit recognition of freedom of

¹¹⁰ See, e.g., Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press, Oxford, 2002); Thomas Meindl, *La notion de droit fondamental dans les jurisprudences et doctrines constitutionnelles françaises et allemandes* [The Notion of Fundamental Rights in The French and German Constitutional Case-Law and Legal Doctrine] (L.G.D.J., Paris, 2003); Constance Grewe and Hélène Ruiz Fabri, *Droits Constitutionnels Européens* [European Constitutional Laws] (Puf, Paris, 1995), 140-190.

¹¹¹ Bruno de Witte, “Droits Fondamentaux et Protection de la Diversité Linguistique [Fundamental Rights and the Protection of Linguistic Diversity]”, in Paul Pupier and José Woerhling (eds.), *Language and Law: Proceedings of the First Conference of the International Institute of Comparative Linguistic Law* (Wilson & Lafleur, Montreal, 1989), 85; Antoni Milian-Massana, “Derechos Lingüísticos y Derechos Fundamentales en España [Language Rights and Fundamental Rights in Spain]”, 30 *Revista Vasca de Administración Pública* (1991), 69; Jaume Vernet, Eva Pons, Agustí Pou, Joan Ramon Solé & Anna Maria Pla, *Dret Lingüístic [Language Law]* (Cossetània, Valls, 2003), 139-158.

language emerged as a historic right for some linguistic minorities.¹¹² Article 30 of the Constitution of Belgium proclaims: “The use of languages current in Belgium is optional; only the law can rule on this matter, and only for acts of the public authorities and for legal matters.” It may be interesting to note that that constitutional provision goes back to the Belgian liberal Constitution of 1831:¹¹³ it is not an issue influenced by inter-war ideas on protection of minorities or by post-war human rights constitutionalism. The Austrian constitutional order includes a similar provision, which originally goes back to the peace treaty of St Germain in 1919.¹¹⁴ The Swiss Constitution of 1999 expressly recognizes in Article 18 freedom of language, which had been previously developed as a non-written fundamental right by the Swiss federal court. The Constitution of South Africa of 1996 proclaims that “everyone has the right to use the language and to participate in the cultural life of their choice” (Section 30). It is clear that under section 30, language usage is not restricted to the use of the eleven official languages recognized in section 6 of the South African Constitution.¹¹⁵ Even if many constitutions lack the notion itself, it can be assumed that every democratic constitutional order does guarantee its content, to the extent that interference with freedom of language is not allowed outside the scope of governmental areas.¹¹⁶ When not formally recognized by constitution, it is derived from a complex of fundamental rights (freedom of expression, right to respect for private and family life, prohibition of discrimination, and so on).

Freedom of language is a universal right: it is not territorially circumscribed and everyone is entitled to it, whatever the language she speaks. Freedom of language includes the right to use one’s mother tongue or any other language, both in speech and writing. Linguistic intolerance and repression of non-dominant languages is regarded to be inconsistent with fundamental rights.¹¹⁷ Freedom of language only guarantees the right to freely determine one’s linguistic behaviour. Its scope is the private sphere. It does not deal with a particular need of freedom of minorities but a general and abstract freedom: individuals are regarded in their abstract nature, not as members of the majority or of the minority. As with every fundamental right, it is not absolute: it has its limits when it affects the rights of others and the pursuance of a legitimate community purpose.¹¹⁸ For instance, protecting the language rights of a minority was considered *prima facie* a legitimate purpose to limit the exercise of freedom of language (as protected by freedom of expression) by the Human Right Committee (HRC) in the aforementioned *Ballantyne* case. The problem lied with the *absolute* character of the prohibition of outdoor advertising in English. The HRC considered that it was¹¹⁹

not necessary, in order to protect the vulnerable position in Canada of the francophone group, to prohibit commercial advertising in English. This protection may be achieved

¹¹² Faingold, *Language Rights* ..., 13.

¹¹³ De Witte, *Droits Fondamentaux* ..., 92.

¹¹⁴ Article 66 of the peace treaty of St Germain, which is part of the constitutional order according to Article 149(1) of the Austrian Constitution, reads: “(3) No restriction shall be imposed on the free use by any Austrian national of any language in private intercourse in commerce, in religion, in the press, or in publications of any kind, or at public meetings. (4) Notwithstanding any establishment by the Austrian Government of an official language, adequate facilities shall be given to Austrian nationals of non-German speech for the use of their language, either orally or in writing, before the courts.”

¹¹⁵ Reddi, *Minority Language* ..., 332.

¹¹⁶ See, e.g., with regard to German constitutional law: Kirchhoff, *Deutsche Sprache* ..., 765-7. See also Foucher, *Le droit et les Langues* ..., 59.

¹¹⁷ Kirchhoff, *Deutsche Sprache* 764.

¹¹⁸ Ibid, 767; similarly, Joseph-G. Turi, “Typology of Language Legislation”, in Tove Skutnabb-Kangas and Robert Phillipson (eds.), *Linguistic Human Rights: Overcoming Linguistic Discrimination* (Walter de Gruyter, 1994), 111; and Deop Madinabeitia, *Los Derechos Lingüísticos* ..., 25.

¹¹⁹ Point 11.4.

in other ways that do not preclude the freedom of expression, in a language of their choice, of those engaged in such fields as trade. For example, the law could have required that advertising be in both French and English.

Nevertheless, freedom of language does not cover all the needs of protection and cultural development of linguistic minorities: for example, it does not protect them from assimilation or acculturation, nor guarantee them the right to learn their own language or to have education in that language. They can use their language privately and, if they are wealthy enough, they can establish their own private schools. That is why advocates of a fundamental rights approach turn to the principle of equality.¹²⁰ The problem of the principle of equality is that it is not a fundamental right with a clear-cut content but a fundamental value.

It should be clear that not all fundamental rights that could have a linguistic dimension do necessarily have it.¹²¹ The best example is the right to education. Education must be provided in speech and writing through a certain language. Who must designate that language, the state or the parents acting for their children? The European Court of Human Rights (ECtHR) established in 1968 in the famous *Belgian linguistic case* that the right to education does not include the right to be educated in one's chosen language.¹²² This basic principle has been reasserted more recently in the case of *Cyprus v. Turkey*: Article 2 of Protocol No. 1 "does not specify the language in which education must be conducted in order that the right to education be respected".¹²³ The precise contours of this judgment may be debated, however. Despite having reasserted the principle stated in the text, the ECtHR ruled in the specific case in a seemingly divergent sense, without believing it to be contradictory to the principle abovementioned. It decided that "(h)aving assumed responsibility for the provision of Greek-language primary schooling, the failure of the 'TRNC' [the non-recognized Turkish Republic of Northern Cyprus] authorities to make continuing provisions for it at the secondary school level must be considered in effect to be a denial of the substance of the right at issue".¹²⁴ In my view, the judgement should be explained in the light of the special circumstances of the case. It is very unlikely that the Court would intend to oblige the many contracting parties not actually providing for education through the medium of minority languages to change their school system to include it. Rather than such a revolutionary vision, it may be concluded from the judgment that the choice of the language of public education must not be arbitrary and that the right to education may in some circumstances require the use of a certain language as the medium of education.¹²⁵

¹²⁰ For a good account of the principle of linguistic equality in comparative constitutional law, see Bruno de Witte, "Linguistic Equality: A Study in Comparative Constitutional Law", 6 *Revista de Llengua i Dret* (1985), 43-126.

¹²¹ See the Decision of the European Commission of Human Rights (ECommHR), application No. 11100/84, *Fryske Nasjonale Partij and others v. The Netherlands*, rejecting the alleged linguistic dimension of diverse ECommHR provisions.

¹²² *Belgian linguistic case* (A/6), (1979-1980) 1 EHHR 252, para. 25. For a comprehensive comparative study on the relationship between language rights and the right to education, see Antoni Milian-Massana, *Derechos Lingüísticos y Derecho Fundamental a la Educación [Language Rights and Fundamental Rights to Education]* (Civitas & Escola d'Administració Pública de Catalunya 1994), 186-202; with an analysis of the Belgian linguistic case; Antoni Milian-Massana, *Schule und Unterrichtssprache :Aspekte des europäischen Sprachenrechts [School and Language of Education: Aspects of European Language Law]* (Diimmler Verlag, Bonn, 1996).

¹²³ *Cyprus v. Turkey*, 35 EHHR 30, para. 277.

¹²⁴ *Cyprus v. Turkey*, 35 EHHR 30, para. 278.

¹²⁵ Antoni Milian-Massana, "Comentarios en Torno de la Ley del Parlamento de Cataluña 1/1998, de 7 de enero", 157 *Revista de Administración Pública* (2002), 352; Antoni Milian-Massana, "L'ordenació Lingüística: Estudi Jurídic de Vint-i-cinc Anys de Normalització del Català a Partir de l'article 3 de l'Estatut d'Autonomia de Catalunya. Virtuts i Dèficits d'aquest Precepte", in *Vint-i-cinc anys d'Estatut d*

Similarly, the Spanish Constitutional Court ruled in 1994 that the fundamental right to education does not involve the right to choose the language of education.¹²⁶ It must be stressed that this ruling concerned parents that wanted their children to be taught precisely in Spanish, which is the state's official language, in a territory that has two official languages, Spanish and Catalan. As a consequence, parents were denied the right to have education through the only state-wide official language for their children, since the Catalan autonomous government had decided to establish Catalan as the only language of public education.

b) The second approach is a relativist one. It makes the point that language rights are fundamental rights only when they are constitutionally entrenched as such. Turi has differentiated between the right to 'a' language (the right to use one or more designated languages in various domains, especially in official domains) and the right to 'the' language (the right to use any language in various domains, particularly in unofficial domains). Every society designates one or more (but always a small number of) languages for the purpose of communication between citizens and authorities. Sometimes, this designation is so rooted in the community that it does not even need an act declaring it: it is based on what could be formulated as "a constitutional assumption of language homogeneity".¹²⁷ The designated language(s) determine(s) the linguistic behaviour of government, the languages allowed in the relationships between it and citizens, and the linguistic content of public services being delivered. As Turi rightly observes,¹²⁸

The right to 'the' language will become an effective fundamental right, like other fundamental rights, only to the extent that it is enshrined not simply in higher legal norms, but also in norms with mandatory provisions that identify as precisely as possible the holders and the beneficiaries of language rights and language obligations, as well as the legal sanctions that accompany them.

Constitutions effectively committed to protect linguistic diversity tend to separate provisions concerning language promotion and maintenance, on the one hand, and classical fundamental rights, on the other. This does not mean that, in that case, the former are secondary in comparison to the latter. The protection of linguistic minorities or of linguistic communities is often considered a fundamental principle of the state. In Canada, the Supreme Court has ruled that the protection of minority rights, including minority language rights, constitutes one of the principles underlying the Canadian constitutional order.¹²⁹ As noted above, similar rulings have been given by the Austrian and the Italian Constitutional Courts.¹³⁰

In Spain, constitutional provisions dealing with the status of languages lie in the Preliminary Title of the Constitution, while fundamental rights are located in Title I. The difference in location does not diminish, but rather enhances the significance of the rules on the status of languages for the political cohesion of the state. Language rights, derived from the constitutional provisions on the status of languages that go beyond the linguistic dimension of classical fundamental rights, do not enjoy the special protection accorded to fundamental rights in the strict sense, but an amendment of those constitutional provisions is subject to stronger requirements (*inter alia*, referendum) than those with regard to constitutional provisions

'autonomia de Catalunya: balanç i perspectives (Institut d'Estudis Autònoms, Generalitat de Catalunya 2005), 356.

¹²⁶ Judgment No. 337/1994. See Milian, *supra* note 122 [Schule und Unterrichtssprache], 85-89, 113-116.

¹²⁷ E.g., in the case of Germany: see Kirchhoff, *supra* note 81.

¹²⁸ Turi, *Typology of Language ...*, 116.

¹²⁹ Reference re Secession of Quebec, [1998] 2 S.C.R. 217, paras. 79-82.

¹³⁰ See *supra* notes 85 and 87.

recognizing fundamental rights. In sum, in a technical and strict sense, language rights are not fundamental rights in the light of the Constitution, but they are not less important.

It must be noted that the Spanish Constitution does not expressly recognize any subjective right concerning the use of languages. Article 3(2) of the Constitution only proclaims the official status of the languages spoken in the various autonomous communities of the state. The proclamation of official status is not expressly linked to any subjective right: the unfolding of the legal effects of the official status on behalf of languages other than Spanish is a task devolved to the legislature of the respective autonomous territories. In any case, the constitutional proclamation of official status is a fundamental political decision, an objective element of the constitutional order, without which the scope of language rights recognized in the Catalan, Galician and Basque speaking territories would not be conceivable. In addition, Article 3(3) stipulates that other “linguistic forms” (*modalidades lingüísticas*) shall also be protected. Thus, there can be two constitutional sources of language rights: the provision proclaiming the official status of some languages and the provision awarding protection to other languages. A similar development can be seen in other constitutional orders. Notwithstanding the general content of Article 6 of the Italian Constitution (“The Republic protects linguistic minorities with special laws”), the implementation thereof, in accordance both with legislation with constitutional rank (statutes of autonomy) and with specific inter-state agreements, lead to differentiate ‘strongly protected’ minorities (*minoranze superprotette*) in three regions, those of Valle d’Aosta, Trentino-Alto Adige and Friuli-Venezia Giulia.¹³¹ Thereby, the Spanish and Italian legislation show that language rights are not independent of the legal order, but constructed through it in several steps, on the basis of a fundamental constitutional decision. The South African Constitution also recognizes a variety of possible constitutional sources of language rights.¹³²

The Constitution of Finland and the Canadian Charter of Rights and Freedoms (CCRF) seem to deliver an exception to the general pattern. They directly recognize language rights of their citizens, without being contingent on legislative implementation. As a matter of fact, they articulate, more or less exhaustively, the principal legal effects of a fundamental political decision on the equal standing of Finnish and Swedish, or of English and French, respectively (by contrast, they show only moderate commitment to the protection of the language of indigenous and aboriginal peoples). Section 17 of the Finnish Constitution, in chapter 2 of the Constitution “Basic rights and liberties”, recognizes the right to one's language and culture:

- (1) The national languages of Finland are Finnish and Swedish.
- (2) The right of everyone to use his or her own language, either Finnish or Swedish, before courts of law and other authorities, and to receive official documents in that language, shall be guaranteed by an Act. The public authorities shall provide for the cultural and societal needs of the Finnish-speaking and Swedish-speaking populations of the country on an equal basis.
- (3) The Sami, as an indigenous people, as well as the Roma and other groups, have the right to maintain and develop their own language and culture. Provisions on the right of the Sami to use the Sami language before the authorities are laid down by an Act. The rights of persons using sign language and of persons in need of interpretation or translation aid owing to disability shall be guaranteed by an Act.

The CCRF contains one of the most detailed enumerations of constitutional language rights. About one-third of the rights recognized in it are language rights, including “minority language educational rights” (Sections 16 to 23). But they follow the same pattern of the Constitution of

¹³¹ Elisabetta Palici di Suni Prat, *Intorno alle Minoranze* (Giappichelli 2002), 33-59.

¹³² Reddi, *Minority Language ...*, 328-350.

Finland: there is a constitutional recognition of fundamental rights to use and receive social services not in whatever language chosen by citizens (for instance, languages spoken by indigenous peoples or immigrant minorities) but only in English and French: the Canadian constitutionalism establishes a dual language system (*dualité linguistique*).¹³³ The equality of Canada's official languages is a status afforded to two languages over others in Canada; a 'privilege' as that term is used in section 16, 21 and 22 of the CCRF.¹³⁴ Therefore, constitutional language rights are "a fundamental tool for the preservation and protection of [two] official language communities".¹³⁵

Moreover, the English language and the French language public school systems are not available to all citizens. The CCRF does not guarantee such a freedom of choice: on the contrary, it restricts the benefit of minority language education rights (for example, education in English in Québec) to certain categories of persons who are members of the language minority. In the *Gosselin case*,¹³⁶ the Supreme Court ruled that the right to equality and non-discrimination cannot be used to modify the nature of minority rights and to extend such rights to the members of the majority or to other persons that do not belong to the very minority to whom the rights are guaranteed. The CCRF's endorsement of Article 27 CCPR is not found within the language rights provisions or the aboriginal rights provisions, but rather in the multicultural heritage provision, Section 27, which stipulates that the CCRF "shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians".¹³⁷

What the second approach stresses is that language rights (beyond the linguistic dimension of classical fundamental rights) are not universal, but a socio-political construct of certain societies. This relation between the socio-political and the legal explains why certain states have institutionalized language rights and others not. However, this approach does not provide for justification of the recognition of language rights; it only certifies states' different approach to language rights as fundamental rights. This leads to the third approach concerning the relation between language rights and fundamental rights.

c) A third approach stresses the specificity of genuine language rights.¹³⁸ Classical fundamental rights are designed to protect individual freedom and autonomy against the repressive or intrusive state and to guarantee individual autonomy by virtue of some social, cultural and economic rights (education, health care, accommodation and so on). The purpose is freedom and equality of all individuals and groups. Even if the emphasis in some states lies with

¹³³ José Woehrling, "La Cohabitation Linguistique au Canada: les Politiques Linguistiques du Québec, de l'État Fédéral Canadien et des Provinces Anglophones [Linguistic Coexistence in Canada: Language Policies of Québec, the Federation and the English-Speaking Provinces]", 69(II) *Revista Vasca de Administración Pública* (2004), 315.

¹³⁴ Grégoire Charles N. Webber, "Canadian Language Rights: Charter, Section 16", in J. Magnet (ed.), *Official Languages of Canada* (forthcoming 2007). Similarly, Luan-Vu N. Tran, *Human Rights and Federalism* (Kluwer, 2000), 276-277, stresses the constitutional asymmetry of language rights recognized in favour of anglophone and francophone groups.

¹³⁵ *R. v. Beaulac*, 1 S.C.R. 768 (1999).

¹³⁶ *Gosselin (Tutor of) v. Québec (Attorney General)*, 1 S.C.R. 238 (2005). On this case see José Woehrling, "La contestation judiciaire de la politique linguistique du Québec en matière de langue d'enseignement [Court Challenges to Québec Language Policy Regarding the Language of Instruction]", 44 *Revista de Llengua i Dret* (2005), 101.

¹³⁷ On the interpretation of this provision, particularly in its relation with Article 27 CCPR, see Joseph Eliot Magnet, "Multiculturalism in the Canadian Charter of Rights and Freedoms", in Gérard-A. Beaudoin & Errol Mendes (eds.), *The Canadian Charter of Rights and Freedoms* (1995), 18: 1; also Tran, *Human Rights ...*, 268-275.

¹³⁸ Foucher, *Le Droit et les Langues ...*, 50-1, 54. See *R. v. Beaulac*, 1 S.C.R. 768 (1999).

freedom and, in some others, freedom and equality are on equal footing, fundamental rights are considered to be universal in character: fair process or freedom of religion belongs to everyone. However, language rights do not deal with spheres of individual action, but with organization of social areas and management of public services through the medium of a designated language or some designated languages (education, relations with authorities, publication of legislation, street and road signage and so on). One could argue that, rather than to protect the freedom or equality of individuals, language rights extend to non-individual expressions of freedom or equality in society. However, this kind of protection can only be accorded to a limited range of linguistic communities within the same territory. Here lies a key to the specific nature of language rights: language rights may be formulated in individual terms or accorded to individuals, but they have a collective dimension that should bear consequences for their scope and interpretation.¹³⁹

The recognition of language rights purports to protect specific linguistic minorities, not every linguistic minority, or to secure equal status to specific languages, not to every language.¹⁴⁰ Even if formulated as fundamental rights, constitutional language rights are not accorded for the sake of freedom and equality of all individuals and groups living in the state, but for the sake of basically protecting certain language communities (for instance, Swedish- and French-speaking citizens in Finland and Canada respectively). Using a phrase from the *Beaulac* ruling of the Canadian Supreme Court, it can be said that constitutional language rights are ‘a fundamental tool for the preservation and protection of [an always limited number of] official language communities’.¹⁴¹ Language rights cease to be universal individual rights and make up a different category of rights if the group which is entitled to such privileges has to be identified.¹⁴²

6. Conclusions

Language rights have a more disputed character than what some seem to suggest. There is no universal understanding of language rights.¹⁴³ They are not essentially given and do not exist prior to positive enactment. Language rights are local, historically-rooted claims, not fixed universals. In fact, this does not differ very much from the actual status of many human rights: for instance, property rights are the object of extensive restriction and regulation everywhere.¹⁴⁴

International law does not offer ultimate models or a set of unambiguous principles and rules to accommodate linguistic diversity. There are a few linguistic *human* rights as such, in principle of negative character, and their practical relevance in democratic societies tends to be reduced; in such societies, there is no prohibition of speaking minority languages, or whatever language one chooses to use, in the private sphere. Linguistic human rights as they stand now under

¹³⁹ Foucher, *Le Droit et les Langues* ..., 54. See also Louis Le Borgne, “Les Droits Linguistiques à l’école et dans l’administration de l’Autriche-Hongrie Entre 1867 et 1914 [Language Rights in Education and in the Administration in Austria-Hungary Between 1867 and 1914]” in Paul Pupier and José Woehrling (eds.), *Language and Law: Proceedings of the First Conference of the International Institute of Comparative Linguistic Law* (Wilson & Lafleur, Montreal, 1989), 325, 341: “Maintenir le principe de personnalité des droits linguistiques sous les dehors d’une confusion avec les Droits de l’Homme est une invitation dangereuse à mettre en conflit permanent les droits individuels traditionnels et ces droits collectifs que sont fondamentalement les droits linguistiques.”

¹⁴⁰ Foucher, *Le Droit et les Langues* ..., 51.

¹⁴¹ *R. v. Beaulac*, 1 S.C.R. 768 (1999).

¹⁴² Sadurski, *Constitutional Courts* ..., 24.

¹⁴³ See, e.g., Webber, *supra* note 134 (insisting on the distinctiveness of the Canadian constitutional language rights); Vernet, Pons, Pou, Solé & Pla, *Dret Lingüístic* ..., 139 (stating that language rights are not independent from a legal order that rules the use of languages within a community).

¹⁴⁴ Loughlin, *Sword and Scales* ..., 203.

international law do not go significantly beyond that point. Only the notion of ‘minority or regional language’ as ruled in the ECRML provides a significantly further but indirect source for developing language rights through domestic legislation. Therefore, what is determining is not the content or the extension of human rights standards in international legal instruments, but the content and extension of guarantees awarded by domestic constitutional and legislative instruments.

Constitutions and national legal orders illustrate a diversity of solutions, approaches and regulatory models. In general terms, language rights are not at the heart of fundamental rights. This, again, seems to run against the notion of linguistic human rights. The widely diverging approaches to language (rights) adopted by states in their legislation on the use or recognition of languages other than official language(s) reveals the difficulty of establishing common principles as human rights.

The recognition and status accorded to language rights is a political matter. Language rights are primarily constructed at the national level. The solutions existing in democratic states—to limit ourselves to them—are very heterogeneous, because ideas and discourses on language issues vary considerably. Consequentially, the existing different models are grounded not only on different political philosophies and ideologies, but also on different legal principles. The application of the same principle (for instance, equality of citizens before the law) can cause opposite language regimes when it is understood in a different way: for instance, on the one side, a monolingual regime in France and, on the other, bi- or multilingual federations in Canada, Belgium and Switzerland. Therefore, even within Europe, a region of the world where there is much insistence on the existence of common values, there is an extraordinary variation of linguistic models.

The motivations for granting language rights by states are also heterogeneous: magnanimity, justice, welfare, power relations between dominant and non-dominant groups, reciprocity with regard to the treatment other states provide for one’s kin minorities, and obligations imposed as a condition to achieve or recover state’s independence. Only part of them has to do with human rights in the strict sense.

This is not to suggest that minority language activists should not invoke universal values or human interests (such as justice, dignity, security or equality) to fight out language policies. As the force of rights discourse depends on the growing acceptance of certain core human values,¹⁴⁵ the strength of the claim to language rights is also dependent on language rights acquiring growing acceptance. But it is important to be aware of the distinction between political claims and demands inscribed in positive law. The issue should not be addressed with strident discourses of almost inviolable and sacred linguistic human rights.

¹⁴⁵ Loughlin, *Sword and Scales* ..., 202.

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